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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 864

ROBERT P. BURRUSS, VIRGINIA R. BURRUSS, JAMES C. TENNANT, JAMES L. TENNANT, *et al.*,

Appellants,

—against—

WOODROW W. WILKERSON, STATE BOARD OF EDUCATION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, HARRISONBURG DIVISION

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Opinions Below

The decision of the District Court for the Western District of Virginia, Harrisonburg Division (three-judge Court) is unreported and appears in Appendix A. The opinion of the same Court denying the Defendants' Motion to Dismiss and referring the matter to a three-judge Court is also included in Appendix A.

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked

(i) This is a civil proceeding alleging that the State of Virginia, in violation of the equal protection clause of the 14th Amendment, has improperly established and maintained a public education system which denies to Appellant children, residing in Bath County, Virginia, an educational opportunity equal to that received by children in other sections of the State, as more fully detailed below. Appellants contend that the distribution of school funds by the State of Virginia as set forth in Chapter 806 of the Acts of Assembly, 1968, particularly items 555, 556, 557, 558, 560, 562, 563 and 564 deny equal protection of the law. See Appendix B.

(ii) Appellants seek review of the ruling of the three-judge District Court dismissing the action, decided May 23, 1969, and filed with the Clerk of the District Court for the Western District of Virginia, Harrisonburg Division on May 27, 1969. The Notice of Appeal was filed on July 21, 1969. The time within which to docket the appeal was extended by Justice Potter Stewart until October 20, 1969, and further extended by Chief Justice Warren E. Burger until November 19, 1969.

(iii) Jurisdiction of the appeal is conferred on the Court by Title 28 of the United States Code, Section 1253.

(iv) Cases sustaining the jurisdiction of this Court are:

Brown v. *Board of Education of Topeka*, 347 U.S. 483 (1954);

Griffin v. *Illinois*, 372 U.S. 353 (1963);

Harper v. *Virginia Board of Elections*, 383 U.S. 663 (1966).

(v) The validity of Chapter 806 of the Acts of Assembly of Virginia 1968, and specifically items 555, 556, 557, 558, 560, 563 and 564 are in contention. They are set forth in Appendix B.

Questions Presented

1. Whether *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd sub nom. *McInnis* v. *Oglivie*, —— U.S. ——, 89 S. Ct. 1197 (1969), authorizes the State of Virginia to establish and maintain dual school systems in the State—an inferior one in poverty-stricken areas and a superior one in wealthier districts?

2. Whether Appellant children are denied equal protection of the law when the State of Virginia establishes, maintains, and supervises one group of schools which is financially able and superior and another group of schools within the same state which is markedly poorer and inferior.

Statement of the Case

1. *When and How the Federal Questions Were Raised and Decided Below*

Appellant's Complaint charged that the method of apportionment of Virginia funds for schools throughout the State constituted a denial of equal protection. At the proceeding before the one judge district court, in which the motion to dismiss was denied and the case referred to the three-judge court, the federal questions were raised again. Similarly, these issues were raised in the briefs and arguments

before the three-judge court which dismissed the action. Both opinions, showing the raising of the issue of denial of equal protection, are set forth in Appendix A.

The equal protection issue is elaborated in the complaint. The complaint alleges and the transcript* demonstrates that the State of Virginia has violated the Equal Protection clause of the Fourteenth Amendment in the manner in which it has fulfilled its duty to establish and maintain a public school system in Virginia, in that enormous disparities have developed because of the way in which State funds have been allocated and particularly in the application of the Basic State Formula for the distribution of State funds. As a result of this denial of equality Appellants and their children, as well as others in areas similarly poor, are treated adversely as compared with individuals in other sections of the State.

The complaint seeks a declaration that the apportionment of state money for education amongst the counties is void and repugnant to the equal protection clause. Further sought is the retention of the cause by the Court until the General Assembly of Virginia acts to correct the constitutional deficiencies, with the Court acting only when Virginia fails to correct the inequalities.

2. *Facts*

The duties of the State in education are established by the Virginia Constitution. Section 129 requires the General Assembly to establish and maintain an efficient public school system. Section 130 places supervisory authority in the State Board of Education. Under Section 132 the State

* References marked "Tr." refer to the transcript of the deposition taken by appellants and admitted into the record by consent.

Board is directed to divide the State into districts of not less than County size. Local school boards are provided for in Section 133. The General Assembly has the power to consolidate districts. Section 135 provides for the authority of the General Assembly to fund the schools, and this section indicates the specific funds from which the money is to come, but importantly gives the General Assembly the power to make appropriations in addition to those coming from the specific funds.

Pursuant to Section 136, local districts are authorized to "raise additional sums," with the method of taxing restricted to taxes on property. In its session in 1968, the General Assembly of Virginia, chapter 806, item 564 sets forth the basic state aid formula of 60% reimbursement of teachers' salaries, based upon an average daily attendance of 30 pupils per teacher in elementary schools, and 23 per funds have been allocated, and particularly in the applica- teacher in secondary schools.

Chapter 806 also provides that the State will pay 60% of the salaries for guidance counsellors (item 555); supervisors (item 557); and principals (item 560), but only in the event that the programs have been initiated by the county with county money (Tr. 23, 27).

For the school year 1967-8, the total educational budget in Bath County provided for expenditures slightly in excess of $499,000.00, of which the State paid slightly more than $173,000.00 (about 34% of the total) and Bath County somewhat over $256,000.00, the balance being supplied by the Federal Government (Tr. 35). Over the years since 1961 the State contribution has risen only slightly while the costs have risen substantially. In 1963 the County effort was $197,000.00; most recently the figure

for local effort rose to $327,000.00 (Tr. 23-25, 35). From every tax dollar the County collects, 82¢ was spent on education (Tr. 23).

The record shows that Bath County has been designated an "Appalachia County" because of its poverty (Tr. 21). For example, the median income for Bath is $3,218.00, as compared to $4,964.00 for the state; 46% of the families live on incomes of $3,000.00 or less (Tr. 27). Although the County is fourteenth in the State in average wealth per child (Tr. 51), this figure is due solely to the approximately 25% of the taxable value of the entire County that is chargeable to one resort hotel, the well-known Homestead Hotel (Tr. 95). Because of the poverty of the people generally, the County is unable to obtain any more revenue by local effort (Tr. 26); 82% of local funds already goes to schools (Tr. 26). Furthermore, the budget for 1969-70 provides that 93% of every local tax dollar be spent on schools (Tr. 104).

Additional effort for schools is essential because the school cost per child in Bath County over the years recently has risen from $320.00 to $481.00 (Tr. 26) with very little increase in aid from the State (Tr. 23-6).

Basically the assistance from the State comes from a reimbursement of 60% of the salaries paid to teachers, with the remainder given for certain special purposes (Tr. 28, 130, Chapter 806, 1968 Acts of Assembly, item 564). But Bath County is the ninth worst county in the State in number of substandard teachers (Tr. 18). Under the State formula for reimbursement of 60% of the teachers' salaries, counties able to pay higher salaries, of course, receive more money. Although effort is made to recruit competent teachers from many areas, Bath cannot

compete with other counties in the State because of the difference in salary schedules (Tr. 19).

What is more, poor counties such as Bath are not fully reimbursed by the State for teacher salaries because their school population is widely dispersed. State aid to counties is based upon the Average Daily Attendance (ADA) of 30 children per class in elementary school, and 23 per class for high school (Tr. 45, 16, 130). Being a poor, rural, widely-dispersed, sparsely-populated county, divided by mountains (Tr. 14), class sizes do not even qualify for minimum reimbursement. Thus the State pays for 60% of the salaries of only 37 out of a total of 53 teachers (Tr. 15-16); no reimbursement exists at all for 16 teachers, who must be paid for entirely by local effort.

Bath cannot afford a visiting teacher, nor can it afford necessary supervisory personnel (Tr. 15). Its health services are inadequate (Tr. 23, 27). While there would be some receipt of State money for these programs, if the County had them, the poverty of the County cannot produce the basic money to initiate the programs (Tr. 15, 73-74). Lack of significant State assistance thus hurts the educational system of "poor counties" (Tr. 125).

Taken for granted in many schools of the State and country, are important subjects not available to the children of Bath County. For example, no effective technical education is available to the children of Bath (Tr. 73, 74). There is a "dire need," for "technical schools to help in trades" (Tr. 113). Because of the lack of technical trade training, many children drop out to go to work for the Homestead Hotel at non-skilled jobs such as caddying (Tr. 78). The drop-out rate for the children of Bath County is the second highest in the State (Tr. 27, 33).

Not only is there a lack of technical training available to the children, but the regular courses are seriously deficient as compared to offerings elsewhere in the State. At the two high schools in Bath County, there are 39.5 units (Tr. 8). The average in the rest of Virginia is 62.8 units, with Fairfax County having 137 units (Tr. 30-31). As a result, Bath County is at, or very near, the bottom of the entire State (Tr. 31-32). (See Record Exhibit 5b, Table 3, for course offering of schools throughout the State.)

As might be expected from the above facts the number of children going on to college in this County is very low; 48% of the children of the various counties of the State go on to college; in Bath County the figure is only 29% (Tr. 33-34). So limited is this education that the children of Bath are not eligible to attend many Virginia colleges and universities, including State educational institutions of higher learning (Tr. 79).

Further, the State aid formula does not provide even minimally for construction costs for new and additional needs. Though the State is fully aware of such needs, this effort must be made by the County on its own (Tr. 147; see letter from State Superintendent of Public Instruction, Dr. Woodrow W. Wilkerson, Tr. 7-11).

Called as an expert witness by plaintiffs, Prof. Samuel Alexander, Jr. described the inequalities created by Virginia. After examining the facts in Bath County, Prof. Alexander answered in the affirmative to the question ". . . Bath County is discriminated against by the State because of its poverty?" (Tr. 130). It was his opinion that the children of Bath County "have a lower educational opportunity than in other parts of the State" (Tr. 131). He further pointed out that the State has set up in the

districts the very inequities and disparities that exist today (Tr. 120-1). The County Superintendent of Bath concluded "... it is impossible for us to provide those services and our students suffer all the way through school" (Tr. 38).

THE QUESTIONS ARE SUBSTANTIAL

1. Establishing and maintaining a dual public school system with substantial inequalities based upon poverty is constitutionally impermissible, and judicially correctible, and therefore not governed by *McInnis* v. *Ogilvie*.

While the Court below believed to the contrary, we urge that nothing in *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd sub nom. *McInnis* v. *Ogilvie*, —— U.S. ——, 89 S. Ct. 1197 (1969), authorizes Virginia to establish and maintain a dual system of schools based upon poverty which discriminates against the poor.

We are concerned in this case with the objective criteria of constitutionally improper discrimination, such as the construction of buildings, the number of courses or units offered, whether technical training is offered, whether the County is so poor that it cannot hire and pay for properly trained teachers, whether it can afford necessary supervisory personnel, and other such concrete matters within the knowledge of the State. *McInnis* to the contrary was concerned with more subjective matters. Paragraph 18 of the *McInnis* complaint for example is concerned with the different levels of "educational attainment" and "educational achievement of the children." Paragraph 1 of the same complaint speaks of the "educational needs" of the children. These criteria may vary as to each child, and

may be beyond the capacity of courts to respond to judicially. But whether technical courses are available only in some counties or whether the basic State formula for reimbursement encourages richer districts to have more qualified teachers are observable and justiciable matters. The factors upon which this case depends are matters of public information.

The Complaint in this case is framed in demonstrable equal protection terms. Paragraph 11 alleges "substantial disparities between Bath County and other localities" because of "the method adopted by the State in its apportionment of State Funds and particularly the formula employed to distribute the State Funds among the localities of the State." The result has adversely affected "the extent of available educational facilities and services." Paragraph 13 of this Complaint alleges that as a result of this system "children attending public schools in Bath County, . . . are denied educational opportunities which are substantially equal to those enjoyed by children attending public schools in many other districts of the State, . . ." Paragraph 14.2 states that the State formula "fails to correct marked differences in the quality of public school buildings, equipment and other facilities, which exist among the public schools . . . as a result of the inequitable apportionment of State monies . . . in past years." Paragraph 15 makes more specific the deficiencies resulting from the inequitable distribution of money for many years by Virginia. Finally, demands for relief here, unlike those in the *McInnis* complaint, are concerned with objective criteria causing inequality of educational opportunity and not with personalized "needs" of children.

Moreover, the level poverty of the area is never mentioned in the *McInnis* amended complaint. The complaint is that the children do not possess normal reading and mathematical skills. Personalized needs may not be justiciable, but the lack of objective items, trained teachers and technical courses is justiciable. The Court below found it could not "tailor the public moneys to fit the varying needs of these students throughout the State." App. 5a. But the phrase "varying needs of these students" misunderstands the very difference between *McInnis* and this case. Nowhere are we concerned about the varying needs of pupils. In this case there is no insistence that the presence of the objective factors will produce excellent students, merely that the opportunity to study and learn should not be denied when it is available in other sections of the State.

Had Virginia maintained a school system openly favoring the economically well-to-do areas of the State, as it once maintained a school system based upon race, beyond doubt that system could not have withstood constitutional attack, and this Court would have no trouble with the question of justiciability. We have in reality such a system, with poverty instead of race the factor producing the discrimination.

As in the case at bar, the lower court ruling in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), had similarly seen the evil, but felt it was not judicially correctable. To that, this Court made its now historic response:

> "Today, education is perhaps the most important function of state and local government. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . . .

> Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Such an opportunity, where the state has undertaken to provide it, is a right which must be made to all on equal terms.*" *Id.* at 493 (emphasis supplied).

In point of fact, we are not concerned here with the quality of Virginia education, except in so far as it is not provided to all on a substantially equal basis. When the action of the State leads to a dual system based upon poverty, when State action discriminates against the poorer areas of the State, equal protection issues are presented requiring the assistance of the federal courts.

In Virginia the responsibility for public education is not a shared responsibility between the State and County, as one might suppose from the opinion of the Court below. Education is clearly the duty of the State. (See Article IX Section 129). What the County may do, should it choose, is supply "additional" funds. (Article IX Section 136). But the responsibilities have been reversed. Education has become the responsibility of the County, with the State offering assistance, not the reverse. The result is the creation of a discriminatory system based upon poverty, and thereby denying equal protection of the law. "A State, of course, has a wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties, . . .", but "the object must be a constitutional one. . . ." *Griffin v. County School Board*, 377 U.S. 218, 231 (1964). Here the inequalities that have developed are not constitutional.

Citing *McInnis* v. *Shapiro*, *supra*, the three-judge Court, aware of facts of record, nevertheless dismissed this action. In doing so, however, it observed that the deficiencies of the Bath County school system are acknowledged. "They are not and cannot be gainsaid." App. 4a. And notably, while rejecting this case, the lower court found, "We can only see to it that the outlays on one group are not invidiously greater or less than that of another. No such arbitrariness is manifest here." App. 5a. For the reasons we will urge below, the test of "arbitrariness" as relied on by the lower court is not the applicable test to be applied in this matter.

2. Virginia has established and maintained an educational system that inevitably denies equal protection of the law to poor districts such as Bath County, where appellants reside.

What constitutes an "efficient" public school system is a State question, not the concern of this case. Nor are we raising here the issue of whether the State *must* maintain a *free* public school system, a question raised in *Griffin* v. *County School Board*, 377 U.S. 218, 231 (1964). Whether or not the State having instituted such a system, must continue such a system, is similarly not before us.

Having assumed such a responsibility, however, and not having discontinued it, may the State create a school system which shifts the major part of that State responsibility to the State-created and supervised county districts having substantially unequal economic abilities to accept those responsibilities? May the State system of financing schools be based on the criteria of wealth or poverty?

Having the duty to establish an educational system under its Constitution, may the State of Virginia knowingly give a relatively small part of the total cost of operating those schools of these County-districts, leaving it to the districts themselves to furnish the bulk of the funds (or whatever funds it can furnish), regardless of the needs of the schools of the district? Does a school system, delivering unequal education and causing great disparity in the schools throughout the State violate equal protection of the law?

(a) *Unjustified Disparities Were Contained in the Establishment of the Virginia Educational System*

First, it is important to note the extent to which Virginia law mandates state responsibility for education. Article IX, Section 129 of the Virginia Constitution requires the General Assembly to "establish and maintain an efficient system of public free schools throughout the State." General supervision of these schools is invested in a State Board of Education (Article IX, Section 131). In Section 132, the Constitution directs the Board to divide the State into divisions of not less than one county or city. Under Section 135 State money for schools "would be received from an annual tax on the property of not less than one nor more than five mills on the dollar, for the equal benefit of all the people of the State, to be apportioned on a basis of school population." Under this section other specified funds are set forth for the same purpose; in addition the Legislature has broad power to appropriate further moneys from the general funds of the State. Section 136 provides that Counties are authorized to raise "additional" sums by a tax on property at a rate to

be fixed by law. Title 22 138.1 of the Code of Virginia following Section 135 of the State Constitution minimally fixes a permanent tax of 10¢ for every $100.00 of assessed valuation to be apportioned on the basis of school population and to be appropriated at each biennial session of the General Assembly with the right of the General Assembly to make available additional general funds.

As the formula was in fact practiced for the distribution of State funds, it became transformed from a State maintenance concept to a County maintenance concept with the State subsidizing teachers' salaries by 60%. As a result counties are reimbursed for only a part of their teacher payrolls. Resulting inequities are felt throughout the county school system. For example, Bath children do not receive the courses to be eligible to enter state universities and colleges such as William and Mary (Tr. 79). The number of courses available to Bath children is among the lowest in the state.

More generally Virginia not only does not meet its obligation to maintain a public school system for all its citizens but, in fact, aids and encourages the richer areas of the State. Hiring more experienced teachers, paying higher salaries, gaining reimbursement for those higher salaries, the richer school districts created by the State give children a greater educational opportunity. Conversely the poorer districts, having inadequate funds and receiving little from the State, hire less skilled teachers (Tr. 18). Special funds are available for special purposes, but there is not the money to initiate those programs where funds are made available on a matching formula.

(b) *Virginia Has Improperly Continued a School System Denying Equal Protection of the Law*

Above we have seen how the basic Virginia system functions generally, how it determines the method of financing, what the administrative sub-divisions are, where the basic supervisory power lies, and how the results of this system are harmful to the poor. In the Statement of the Case, we have described some of the harmful effects. In no sense was this an accidental growth. The denial of equal protection through the creation of the dual system with poverty as the major factor, came from the methods of financing schools at issue here.

Nothing in the Constitution of Virginia, however, has ever prevented it from making the system more equitable. Under this system Virginia could have appropriated sufficient funds so that the disparities between richer and poorer county school systems would be substantially smaller; the problem might not then be of a constitutional dimension. Instead of transferring the burden to the local districts it created, for example, it could have paid for the basic system, perhaps leaving it to the districts to make some additions or modifications. Although assuming the duty of maintaining a free school education, Virginia instead passed this burden in major part to the districts. Virginia thus initiated and then perpetuated the inequalities and disparities which a state-wide system would hope to minimize instead of increase.

In the case of Bath County, and similarly situated poor areas, the disparity is below any reasonable or rational level. From the facts we have shown as to the conditions of the schools—the teachers, the facilities, the courses offered, the ability of children to enter college

and the drop-out rate—the children of these poverty areas are doomed to lack of training and to perpetual poverty.

On many occasions this Court has recognized that distinctions based upon poverty are constitutionally invidious. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). In the case at bar the educational opportunity of a child is dependent, not on his efforts and skill, but on how rich his county is. Virginia may have the right to have a bad school system, it may have the right to have, perhaps, any kind of system it desires, but it cannot maintain of its own creation which is part rich and part poor.

In *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), this Court in examining the closing of schools in that Virginia county could have expressed the view that the school closing applied equally to whites as well as blacks, since in a limited literal sense this was so. Instead this Court recognized the reality of the situation and said, "Closing Prince Edward's schools bears more heavily on Negro children. . . ." 377 U.S. at 230. The reality here is that the State has initiated a school system whose adverse effects bear "more heavily" on poor children.

(c) *Virginia Maintains Unconstitutionally Different Educational Opportunities in Various Areas of the State*

The complaint, paragraphs 6-16, urged and the opinion acknowledged inequalities in educational opportunities, despite maximum effort by the County. Yet in looking at the Virginia funding system the Court said, "No such

arbitrariness is manifest here" because the outlays on "one group are not invidiously greater or less than that of another." (Below we shall discuss whether, in any event, the arbitrariness test is the proper one in a case such as this one.)

In our view the Court below fell into error because it narrowly saw that Bath and Fairfax Counties received approximately the same number of dollars per pupil from the State. Ignored by the Court, however, was the fact that the State Constitution placed the duty on the General Assembly to establish and maintain public education with supervision in the State Department of Education. Included among the powers was the right to designate administrative sub-divisions of not less than county size. Having designated the counties, Virginia apparently believes its duty thereby ends.

Nothing in the State Constitution transfers the educational duty of the State to the County. While permission is given to the counties to have programs of special interest, the supervisory power continues to lie with the State. Section 133 of the Constitution authorizes the General Assembly to merge districts in order to aid the State to carry out the duty to educate. Although the County may appropriate "additional funds" the primary duty is still the State's. The right of the County to appropriate additional funds does not of course alter the State's basic responsibility. No requirement that a County must appropriate any money for educational purposes appears in Virginia law. Yet Bath has been forced to appropriate more and more for vital items because the State has failed to do so. In the period of years when school costs heavily increased, the State increased its contribution $13,000.00,

while the County was forced to increase by $138,696.00. At a time when instructional costs increased 25%, the State increase was substantially less than 10%. The County contribution rose about 60% (Tr. 23-25). This failure on the part of the State has caused a dual system of schools with poverty as the governing factor.

When a condition of blatant inequality develops, it becomes necessary to look at the total picture to see whether or not constitutional issues are raised, and whether the State has failed in its duty to some. Only an examination of all the sums spent on the schools can reveal whether the State is carrying out its duty equally.

Let us suppose a debtor has two debts, and asks A and B to help pay them; A does and B cannot. The creditor in the A situation has no complaint, because his debt has been taken care of. But this is not true in the B situation. The creditor in the B situation is not satisfied although the debtor has given both A and B equal sums of money to pay a part of this debt. So it is with the children of the poorer areas. The obligation is the State's; the creditors are the children. When told to do so, Fairfax, for example, is well able to pay the State's obligation to the children; but Bath, for example, is not. The obligation of the State still remains. It reaches constitutional proportions when it results in patent unfair and unequal treatment.

The duty of the State is to educate. It may use the counties to help, but the State must supervise and manage education. Simply appropriating money and abdicating the remainder of that responsibility to maintain, supervise and manage is constitutionally improper when it produces great differences in educational opportunity

available to poor counties as compared with richer counties. When a dual system of schools results from such a system, it is no more permissible than a dual system based on race or religion, particularly when it produces the same kind of unfairnesses. *Brown* v. *The Board of Education of Topeka*, 347 U.S. 483 (1954).

Having the power to correct the inequalities, through rearrangement of the districts and through other formulas for appropriations while permitting the gross inequalities to continue, is constitutionally invidious and arbitrary. The view of the Court below that there was no invidious discrimination ignores the improper transfer of the responsibility for schools to the County from the State.

What the State appropriates is important, but is only a part of the question of whether the State is acting unconstitutionally in the way it is carrying out its duty to children. When the transfer of the responsibility from the State to the County results in the inequities that have in fact resulted, then we urge that the Court below was in error in looking at the problem solely from the view of the apparent equality of the sums the State gave to each county, and whether there was an invidious and arbitrary difference in that amount.

When the duty is the State's, perhaps the State may call upon the county to help, but the duty remains no less the State's, and the obligation to the children continues whether the county can or cannot help. When the county cannot pay enough, it is the State which has failed to educate children in an equal fashion; and the inequality is based upon the poverty of the area in which the children live. We

urge that this broader view of the obligation presents a more accurate picture of the arbitrary and invidious way the State carries out its duty, resulting in a discriminatory course of conduct and a dual system of schools.

(d) *In Addition to the General Discriminatory Conduct Described Above Virginia Further Increases the Discrimination by Special Acts Further Harming Poorer Areas*

Above we have attempted to show that the Virginia method of financing schools inevitably led to the inequalities described in the facts herein. In addition to this generalized improper course of conduct, Virginia enhances the richer areas of the State as follows:

(i) The basic formula for reimbursement to the County by the State is not a straight allotment of money according to the Average Daily Attendance. Instead the formula provides that the State pay for 60% of the sums spent for teacher salaries. Because of its poverty, 25% of Bath's teachers are without degrees. The average teacher salary is among the worst in the State. Counties able to hire more degree teachers by paying higher salaries thus receive the greater reimbursement.

(ii) The reimbursement formula fixing reimbursement on an average elementary school class of 30, and high school class of 23, means that a sparsely settled county is only partly reimbursed for its teacher payroll (Tr. 16). Bath is the sixth lowest County in terms of the ratio of State aid to its total school costs. Only 34% is paid by the State.

(iii) Reimbursement is provided to the County by the State for such items as visiting teachers and supervisory

personnel; but because of its poverty, Bath cannot initiate such programs, and thereby become eligible for State assistance. For this reason only one guidance counsellor exists for all the children (Tr. 69), and there is no technical training available (Tr. 74).

(iv) To all of this must be added the information that the State gives nothing for new construction, although the need is great as the State has recognized (Tr. 147, 7-11). To the richer areas the State will provide a lower rate of interest for the borrowing of money for construction; but if the County does not have the money to start such a program, no help is offered (Tr. 147).

Factors such as these led the expert witness, Prof. Alexander to conclude what we believe this Court must conclude:

> ". . . I say there is no doubt that the State system of school finance in Virginia perpetuates the inequities in educational opportunity and forms a vicious cycle that in turn perpetuates the cycle. Children are attending school with one-half the expenditure per pupil as in another part of the State, they either drop out or get an inferior education, then they in turn have lower aspiration levels in their children because of the same factors, they have a lower educational opportunity than in other parts of the State" (Tr. 131).
>
> ". . . the State has created inequities and disparities among the school districts among the children of Virginia. . . . The inequity exists because this entire system except for the Federal funds is created by the State Legislature of Virginia, a system that is and has almost twice as much per pupil in Arlington as it does for a pupil in Amherst and Bath County" (Tr. 120-1).

(c) *In Light of the Importance of Public Education, the Test of Arbitrariness in Judging the Conduct of the State Was Improper and the Test to Have Been Applied Should Have Required Virginia to Show the Compelling Necessity of the State to Discriminate Against Poverty Areas*

In their respective ways public education and public welfare are among the most important problems to which a state must direct its attention. While we believe, that the actions of Virginia were arbitrary in denying Equal Protection and that there is no reasonable basis upon which a discriminatory educational system may be maintained, nevertheless the "arbitrariness" test, as used by the Court below, was incorrect. The State should have been required to show the compelling necessity to maintain a system which does not supply education equally to all, as *Brown v. Board of Education, supra,* required. See *Shapiro* v. *Thompson,* —— U.S. ——, 89 S. Ct. 1322 (1969).

The Court below recognized the inequality of the Virginia educational system. It further recognized that this condition was not the fault of the County. Under these circumstances the State should have been required to show the compelling necessity for the continued existence of a system as full of disparities as the record herein shows.

CONCLUSION

This appeal raises issues of fundamental importance based on the denial of Equal Protection in education to school children. In light of the importance of education in modern American life the Court below did not properly consider the actions of the state of Virginia in denying a fundamental right. The issues are substantial and require the plenary consideration of this Court with briefs and oral argument.

Respectfully submitted,

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APPENDIX A

Decision of Court Below

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

HARRISONBURG DIVISION

HARRISONBURG, VIRGINIA

Civil Action No. 68-C-13-H

ROBERT P. BURRUSS, VIRGINIA R. BURRUS, JAMES C. TENNANT, JAMES L. TENNANT, *et al.*,

—v.—

WOODROW W. WILKERSON, STATE BOARD OF EDUCATION, *et al.*

(Argued April 25, 1969 Decided May 23, 1969)

Before Bryan, Circuit Judge, and Dalton and MacKenzie, District Judges.

Erwin S. Solomon, Hot Springs, Virginia, Commonwealth Attorney, Bath County, Virginia, for plaintiffs.

Robert Y. Button, Attorney General of Virginia, Richard N. Harris, Assistant Attorney General, and John S. Davenport, III, who argued the case for defendants, and Henry Wickham, all of Richmond, Virginia, for defendants.

Albert V. Bryan, Circuit Judge:

Constitutional invalidity is laid in this suit to Virginia's statute[1] establishing the scheme for distribution of the funds she provides for public education. Bath County suffers discrimination from the operation of this Act of the General Assembly, allege the plaintiffs as resident parents and school children, as well as property owners, there. Defendants are for the most part State officials whose functions and duties touch the disbursement of these moneys.

The grievance pressed and the remedy sought are typified by these paragraphs of the complaint:

> "14. The Act, and particularly its formulae for the apportionment of State Funds among the several counties and cities of the State, creates and perpetuates substantial disparities in the educational opportunities available in the different counties and cities of the State, denies children attending public schools of the County, including Plaintiff Children, educational opportunities substantially equal to those enjoyed by children attending public schools in many other districts of the State, and is thereby repugnant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States of America, in the following respects:
>
> "14.1. The Act, and particularly its formulae for the apportionment of State Funds, utterly fails in any

[1] Appropriation Act of 1968-70, Acts of Assembly, 1968, chapter 806, item 564.

manner or to any extent whatsoever either (i) to relate to any of the variety of educational needs of the several counties and cities of the State of Virginia—much less weigh the relative acuteness of these needs or provide any sort of balanced response to them, or (ii) to take into account any factors which would tend to equalize the educational opportunities made available in public schools in different parts of the State.

* * * * *

"14.3. The Act, and particularly its formulae for the apportionment of State Funds, fails to take into account in any manner whatsoever, or to compensate to any extent for, substantial differences in the levels of school construction costs, salaries of teachers, administrators and other public schools employees and other expenses of public elementary and secondary education which prevail in different areas of the State of Virginia.

* * * * *

"A. That this Honorable Court enter its judgment declaring the Act, and particularly its formulae for the apportionment of monies appropriated from the School Fund among the several counties and cities of the Commonwealth of Virginia, void and without force or effect as repugnant to the fundamental law of the United States as set forth in the equal protection clause of the Fourteenth Amendment to the Constitution."

Reliance is put first on section 129 of the Constitution of Virginia: "The General Assembly shall establish and

maintain an efficient system of public free schools throughout the State". Plaintiffs' contention is that the Act in suit fails to meet this obligation. This, they say, is primarily demonstrated by the marked deficiencies of the Bath County School physical and instructional facilities, when compared with those of the other political subdivisions in Virginia. These differences, it is urged, evidence an inequality of treatment—want of equal protection of the laws—of Bath County.

The existence of such deficiencies and differences is forcefully put by plaintiffs' counsel. They are not and cannot be gainsaid. But we do not believe they are creatures of discrimination by the State. Our reexamination of the Act confirms that the cities and counties receive State funds under a uniform and consistent plan. With this conclusion we resolve the chief issue of the case, and exposition of the method of computation is not necessary. For the particulars of the calculation, we rely upon the explanation contained in the opinion of the court in Shepheard v. Godwin, 280 FS 869, 872 (E.D.Va. 1968), with the qualification that no longer are Federal impact funds, there mentioned, considered in the apportionments.

Truth is, the inequalities suffered by the school children of Bath are due to the inability of the county to obtain, locally, the moneys needed to be added to the State contribution to raise the educational provision to the level of that of some of the other counties or cities. The blame cannot be placed on the people or the officials or the county. Rather it is ascribable solely to the absence of taxable values sufficient to produce the required moneys. The tax rate and the appropriations have been strained to afford the children better schools.

Actually, the plaintiffs seek to obtain allocations of State funds among the cities and counties so that the pupils in each of them will enjoy the same educational opportunities. This is certainly a worthy aim, commendable beyond measure. However, the courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the State. We can only see to it that the outlays on one group are not invidiously greater or less than that of another. No such arbitrariness is manifest here.

Our conclusions here are supported by the decision of the 3-judge Federal District Court in McInnis v. Shapiro, 293 FS 327 (N.D. Ill. 1968), aff'd sub nom. McInnis v. Ogilvie, 37 Law Week 3350, —— US —— (March 25, 1969). The circumstances of that case are scarcely distinguishable from the facts here, Virginia's division of school funds closely paralleling Illinois'.

While we must and do deny the plaintiffs' suit, we must notice their beseeming, earnest and justified appeal for help. Virginia, we are told, is studying the school conditions in Bath and other counties confronted with similar inequalities. The General Assembly undoubtedly will come to their relief.

An order will be entered dismissing this action.

301 F.Supp. 1237

Opinion of Ted Dalton, U.S.D.J.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

HARRISONBURG DIVISION

HARRISONBURG, VIRGINIA

Civil Action Number 68-C-13-H

ROBERT P. BURRUSS, *et al.*

—v.—

WOODROW W. WILKERSON, Superintendent of Public Instruction, *et al.*

The plaintiffs, school-aged children and residents of Bath County, Virginia, have invoked the jurisdiction of this court under the provisions of 28 USC §1343(3) and 42 USC §§1983, 1988, seeking a declaratory judgment to the effect that the Virginia Basic State School Aid Fund Act, under which state funds are apportioned to local school districts, is unconstitutional under the equal protection clause of the Fourteenth Amendment and Section 129 of the Virginia Constitution. The gist of their argument is that the apportionment formula works to the disadvantage of the relatively poor rural counties, and thereby denies

the plaintiffs an educational opportunity comparable to that enjoyed by residents of most other Virginia school districts. Plaintiffs also request that this court enjoin the defendants from the further execution of their duties under the Act.

The defendants have filed a motion to dismiss the action for the reasons that the complaint fails to state a claim upon which relief can be granted, that this court lacks jurisdiction of the subject matter and of the parties, and that the relief requested in the complaint may only be granted by a three-judge court under the provisions of 28 USC §2281 and §2284.

This court is of the opinion that the Eleventh Amendment does not prevent a federal court from entertaining suits against state officials to enjoin them from invading constitutional rights. *Ex Parte Young*, 209 U.S. 123 (1908); *Griffin* v. *School Board*, 377 U.S. 218, 228 (1964). Relief might be obtained for the plaintiffs by means of an injunction without requiring the state to take any affirmative action. *James* v. *Almond*, 170 F.Supp. 331, 341 (E.D. Va. 1959); see *Reynolds* v. *Sims*, 377 U.S. 533, 586-7 (1964).

Federal courts clearly have jurisdiction of the subject matter of this complaint under 28 USC §1343(3) and the Civil Rights Act, 42 USC §1983. See *Baker* v. *Carr*, 369 U.S. 186, 198-201 (1962).

Where the relief requested by the complaint may only be granted by a three-judge court under 28 USC §§2281, 2284, the fact that the plaintiffs did not request such a court does not justify dismissing the complaint. This court, and not the plaintiffs, has the duty of determining the need for a three-judge court, and of requesting that it be convened. *Bell* v. *Waterfront Commission*, 279 F.2d 853 (2nd Cir. 1960).

If the complaint presents a substantial constitutional question, this court cannot dismiss it, but must request the Chief Judge of the Court of Appeals to convene a three-judge court. *Aaron* v. *Cooper*, 261 F.2d 97 (8th Cir. 1958). The duty of initially determining whether a substantial federal question is presented lies with this court. *Ex Parte Poresky*, 290 U.S. 30 (1933); *Jacobs* v. *Tawes*, 250 F.2d 611 (4th Cir. 1957).

Ex Parte Poresky, supra, restated the test of whether a substantial constitutional question exists, to wit, the question is insubstantial if it is "obviously without merit" or if the question is foreclosed by previous decisions of the Supreme Court. 290 U.S. at 32. In applying this test, we look no further than the well-pleaded facts alleged in the complaint. *Mosher* v. *Phoenix*, 287 U.S. 29 (1932).

Viewing legal precedents in a light most favorable to the complainants, we find no Supreme Court decisions which foreclose the question here presented. On the contrary, we find several decisions which lend substance to the complaint, and the relevant legal principles may be summarized as follows.

The right to an equal educational opportunity was clearly recognized in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). While racial discrimination is not an issue in this proceeding, at least one recent interpretation of this right to an equal educational opportunity suggests that the right protects individuals not only from discrimination on the basis of race, but also on the basis of poverty. *Hobson* v. *Hansen*, 269 F.Supp. 401, 497 (D.C. D.C. 1967). Poverty does appear to be a factor contributing to the conditions which give rise to the plaintiffs' complaint. It is clear beyond question that discrimination based on poverty is no more permissible than racial discrimination, and that

the discrimination on the part of state officials need not be intentional to be condemned under the equal protection clause. See *Griffin* v. *Illinois*, 351 U.S. 12 (1955) (free appellate transcripts for indigents); *Douglas* v. *California*, 372 U.S. 353 (1963) (free appellate counsel for indigents); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966) (Virginia poll tax invalidated). The rationale of these decisions appears to be that state policies imposing conditions on the exercise of basic rights, which conditions operate harshly upon the poor, must be clearly justified in order to be constitutionally permissible. Whether the plaintiffs can establish facts which would bring their plight within the ambit of the *Griffin-Douglas-Harper* reasoning would appear to be a question for determination by a three-judge court.

We recognize that the complaint raises questions about whether a federal court should abstain from deciding the federal questions involved in order to permit the state courts to pass judgment on the questions of state law. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941); *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). However, this exercise of equitable discretion is likewise committed to the determination of a three-judge court. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713 (1962).

Since we are unable to say with certainty that the constitutional issues presented are wholly without merit, the defendants' motion to dismiss is overruled, and this court being of the opinion that a three-judge court as prescribed in 28 USC §2284 should be convened to consider this action, it is Ordered that such procedure be adopted, and this court will forthwith request Chief Judge Clement F. Haynsworth, Jr., of the Court of Appeals for the Fourth Circuit to convene such a court.

The Clerk is directed to send a copy of this opinion to counsel of record.

/s/ Ten. Dalton
U. S. Chief District Judge
November 16, 1968

A True Copy. Teste:

Leigh B. Hanes, Jr., Clerk

By: s/ Daisy H. Nailen
Deputy Clerk

APPENDIX B

Chapter 806 of the Acts of Assembly of Virginia, 1968

	First Year	Second Year
Item 355		
Reimbursement to localities of sixty percent (60%) of the salary cost for local guidance counselors on the basis of the minimum salary schedule	$ 2,012,000	$ 2,120,000
Item 356		
Reimbursement to localities of sixty percent (60%) of the salary cost for local guidance counselors on the basis of the minimum salary schedule, from special revenues received for the purpose from the Federal government $400,000 the first year, $400,000 the second year.		
Item 357		
Reimbursement to localities of sixty percent (60%) of the salary cost for local supervisors and directors of instruction in elementary and high schools, including visiting teachers	$ 1,479,360	$ 1,545,600
Item 358		
State aid to localities for special education	$ 5,802,000	$ 6,150,750
This appropriation includes $4,874,000 the first year, and $5,090,000 the		

First Year Second Year

several sum for reimbursement to localities of sixty percent (60%) of the salary cost of special education teachers, on the basis of the minimum salary scale.

From this appropriation, the State Board of Education may, under its rules and regulations, expend an amount not to exceed $100,000 each year to provide for the education of children handicapped because of aphasia and for children who are otherwise severely handicapped.

Item 360

Reimbursement to localities of sixty per cent (60%) of the salary cost for employing principals during two summer months on the basis of minimum salary schedule.

Item 361

Schools of the primary and grammar grades, for the equal benefit of all the people of the State, to be apportioned and distributed to each School Board in this State on a basis of school population, the number of children between the ages of seven and twenty years in each school district

	First Year	Second Year

	First Year	Second Year
564		
school and blind	$171,248,115	$195,309,225

In the apportionment of the sums in this item, the sums which have been or will be received by the respective localities under Items 562 and 563 shall be considered as if they had been received under this item. The total of these sums shall be apportioned to the public schools by the State Board of Education under rules and regulations promulgated by it to effect all of the following provisions stated herein.

a. Apportionment.

1. Subject to the conditions and definitions stated below, each locality shall receive:

a) a State basic share equal to sixty per cent (60%) of the minimum salary cost.

b) a State supplementary share equal to the amount by which the minimum program cost exceeds the sum of the basic State share and the local share.

b. Definitions applicable to State Board of Education items.

1. "Average daily attendance" the average daily attendance for

	First Year	Second Year

the first seven (7) months (or equivalent period) of the school year in which funds are distributed.

2. "State aid teaching position" one teaching position for each thirty (30) pupils in average daily attendance in the elementary grades and one teaching position for each twenty three (23) pupils in average daily attendance in the high school grades.

3. "Minimum salary schedule" the salary schedule for teachers and other instructional personnel approved by the State Board of Education and the Governor.

4. "Minimum salary cost" the cost of salaries paid teachers in State aid teaching positions in accordance with the minimum salary schedule.

5. "Minimum program cost" minimum salary cost plus one hundred and ten Dollars ($110) per pupil in average daily attendance during the first year, and plus one hundred and th

	First Year	Second Year
teen dollars ($1150) per pupil in average daily attendance during the second year.		
6. "Local share" an amount equivalent to a uniform tax levy of sixty cents (60¢) per one hundred dollars ($100) of true value of local taxable real estate and a public service corporation property within a county or city. The true valuation used for this purpose shall be that determined by the State Department of Taxation for the tax year 1966.		
C. Conditions:		
1. Each locality shall put into effect the minimum salary schedule.		
2. Each locality shall provide from local resources not less than thirty per cent (30%) of its total expenditures (exclusive of capital outlay and debt service) for school operation. It is provided that local funds required by this section shall be construed to include the proceeds of any sales tax collected by the State and returned to the localities.		

	First Year	Second Year
3. No apportionment from this item shall be made to any locality for State aid teaching positions in excess of the number of such positions in which teachers are actually employed; provided, however, that in exceptional circumstances and in the discretion of the State Board of Education, a locality may employ fewer teachers than the number of assigned State aid teaching positions, as defined herein.		
4. No apportionment from this item shall be made to any locality for a State aid teaching position in the kindergarten program unless the occupant of the position meets such requirements as may be stipulated by the State Board of Education.		
5. If any municipality annexes any portion of any county or counties, the State Board of Education shall make such equitable adjustment of the funds which they otherwise would have received as it deems justified by the changes resulting from the annexation. This pro-		

	First Year	Second Year

vision shall not apply if a court of competent jurisdiction makes the adjustment.

6. Allotments of funds from this item shall be paid to a locality only after submission of evidence satisfactory to the State Board of Education that the amount for which the allotment is claimed has been or will be expended for the purpose designated and in full compliance with the terms and conditions set forth pursuant to this item.

7. The State Board of Education, with the prior written approval of the Governor, may adjust the distribution of this fund when there is a substantial loss in average daily attendance of pupils in any locality. The average daily attendance data for the locality for the previous year may be used in making this adjustment.

8. The State Board of Education may, in its discretion, apply eligibility requirements and compute allocations from this fund separately for any town

	First Year	Second Year
school district operated by a school board of not more than five members, and the county in which such town is located.		
Item 564.1		
Basic school aid fund guarantee	$ 579,895	$ 88,345

This appropriation shall be added to that in Item 564, if required, in order to assure that during each year of the current Biennium each locality shall receive from Items 562, 563, and 564 an amount at least equal to the amount it received in the year ending June 30, 1968, from the application of Item 459 of Chapter 719, Acts of Assembly of 1966; provided, however, that if a locality has a lower number of pupils in average daily attendance during the current biennium than in the 1967-68 school year, the amount it shall receive under this paragraph shall be adjusted on the basis of the lower number.

* * * * *

FILED
DEC 2 1969
JOHN F. DAVIS, CLERK

No. 864

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

ROBERT P. BURRUS, et al., *Appellants*,

v.

WOODROW W. WILKERSON, etc., et al., *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, HARRISONBURG DIVISION

BRIEF SUPPORTING JURISDICTIONAL STATEMENT FOR AMICI CURIAE

American Federation of Labor–Congress of Industrial Organizations

International Union, UAW

Western Center on Law and Poverty

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IN THE

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ROBERT P. BURRUS, et al., *Appellants,*

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BRIEF SUPPORTING JURISDICTIONAL STATEMENT FOR AMICI CURIAE

American Federation of Labor–Congress of Industrial Organizations

International Union, UAW

Western Center on Law and Poverty

Interests of Amici

The American Federation of Labor–Congress of Industrial Organizations is a federation of 122 national and international labor organizations having a total membership of approximately 12,500,000. The American labor movement has throughout its history sought maximum educational op-

portunity for all children. Unions played a major role in the establishment of public schools early in the 19th century and have continuously worked for the extension and improvement of public education. This case directly involves the quality of schooling and the integrity of the public education concept in theory and in practice throughout the United States.

The United Automobile Workers and its nearly one and a half million industrial-worker members are vitally interested in quality public education for all our children. Having long supported the interests of the disadvantaged and the poor, UAW believes strongly in equality of educational opportunity and believes that a public education system built on inequality plainly violates fundamental constitutional guarantees.

The Western Center on Law and Poverty, funded primarily by the Office of Economic Opportunity, is a consortium of OEO-supported legal services programs and law schools in Southern California. It serves as a central research and technical assistance agency for these legal services programs, and has been active in efforts to achieve equality of educational opportunity for the poor. Lawyers affiliated with the Center are counsel for plaintiffs in *Serrano* v. *Priest*, No. 938254, Superior Court, County of Los Angeles, similar to the case now before this Court.

Letters of consent by appellants and appellees in this case to the filing of this brief amici curiae have been filed with the clerk of this Court.

Statement and Argument in Support of Probable Jurisdiction

In this case the Court's attention is directed more clearly than it was upon the confused pleadings in *McInnis* to tragic inequalities in the public education schemes of our states,

which undercut the central premise of our public education system. In its early years the public education movement in the United States gave promise of a great egalitarian reform: the children of poor families unable to afford private education would receive their preparation for life and livelihood through public support. J. Quincy, Municipal History of the Town and City of Boston 21-22 (1852). See *Brown* v. *Board of Education*, 347 U.S. 483, 493. As Horace Mann stated it: "Education . . . prevents being poor." But it was soon discovered that some localities were too impoverished to bear so significant a fiscal burden from local tax revenues; accordingly, early in the development of our public education systems most states adopted equalizing "flat grant" and "foundation plan" payments of direct state money supplements to local school districts. Today it is clear that these state aid measures have failed in their egalitarian intent. For in numerous states (including the largest and most populous) there exists a first rate public education for some children, only passable schooling for others, and a vastly inferior public education for children in poorer areas—chiefly our central cities and small rural localities.

Public education in many of our states presents a picture of four-fold inequality: i. gross malapportionment of school districts with respect to their resources for school finance; ii. great disparities (as much as 7 to 1) between school districts in per-pupil expenditures; iii. vast inequalities in the public education thus provided for children within the same state; and iv. inferior public schooling and preparation for life and livelihood for the poorest and most needy children. These multiple inequalities underly this case and similar suits pending in state and federal courts in California,[1]

[1] *Serrano* v. *Priest*, No. 938254, Superior Court, Los Angeles County, and *Silva* v. *Atascadero Unified School District*, No. 59554, Superior Court, San Francisco County.

Michigan,[2] Texas,[3] and Wisconsin,[4] which invoke substantial equal protection issues under this Court's previous decisions. See generally, Horowitz, *Unseparate but Unequal—the Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A. L. Rev. 1147 (1966).

Malapportionment of School Districts. The ultimate cause of the constitutional infringements presently in issue is the malapportionment (or non-apportionment) of school districts with respect to their ability to finance public education. Under state laws and constitutions throughout the nation, public education is a state responsibility and the establishment of school districts and operation of public schools is regulated by state law.[5] Typically, the legislature provides that, except as supplemented by state payments to local districts, the principal fiscal burden for the operation of public schools is borne by local levy of taxes upon property within the school district. A. Wise, *supra* note 5 at 127. Due to historical fortuity aggravated by the force of political inertia, today's school districts are grossly malapportioned with respect to their ability to finance from local revenues the education which it is their function to provide. Measured by per-pupil assessed property values in the district, the magnitude of the malapportionment in inability to finance

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[2] *Detroit Board of Education* v. *Michigan*, No. 103342, Circuit Court, Wayne County, Mich.

[3] *Rodriguez* v. *San Antonio Independent School District*, No. 68-175 S.A., U.S.D.C., W.D. Tex.

[4] *Bellow* v. *Wisconsin*, No. 127060, Dane County Circuit Court, Wisc.

[5] State constitutions commonly provide that public education is a state function entrusted to the preservation and control of the legislature. Mich. Const., art. VIII; Ill. Const., art. VIII; Cal. Const., art. IX. See *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, 657 (E.D. La. 1961) *aff'd*, 368 U.S. 515. See also N.Y. Consol. Laws §§ 310, 1505 (McKinney 1953); Mich. Stat. Ann. 15.3402 (1968); *Kinney* v. *County Bd. of School Trustees*, 7 Ill. App. 2d 286, 289, 129 N.E. 2d 292 (1955); *County School Trustees* v. *Common School District No. 6*, 284 S.W. 306, 307 (Tex. Civ. App. 1926); A. Wise, Rich Schools, Poor Schools, 93-112 (1968).

education at comparable property tax rates is typically on the order of 50 to 1, 100 to 1, and even greater disparities between the state's wealthiest and poorest districts. In Michigan the River Rouge District's property valuation per pupil is $53,156, while Forsyth's is $1,319; in California the Big Creek District has $306,077 per average daily pupil attendance, while Olinda District has $3,698; the range in New York is from over $200,000 to under $5,000.[6]

ii. *Disparities in School Funding.* The malapportionment of school districts with respect to their taxable wealth results in great disparities in school funding, notwithstanding state "equalizing" supplements and the heavier tax rates which poorer districts typically impose to meet minimum education requirements. Thus, most states provide per-pupil "flat grants", and "foundation plan" supplements to school districts in amounts as high as $300 or $400 per child—supplements usually somewhat weighted to favor the poorer school districts. However, the state aid amounts are usually at or near the lowest per-child expenditure levels in the state so that their equalizing impact is very limited. Then, too, poorer districts tend to impose on themselves substantially higher school tax rates to produce school revenues, as the District Court conceded in the present case involving Bath County, Virginia. Yet these efforts to reduce the impact of school district malapportionment leave gross inequalities, as high as 7 to 1, between the per-child expenditure in the state's wealthiest and poorest district. Thus, in Virginia the annual per-child expenditure ranges from $541 in Arlington County to $72 in Buchanan County; in California from $1,353 in one elementary school district to $265 in another; in New

[6] See J. A. Thomas, School Finance and Educational Opportunity in Michigan 20 (1968); California State Department of Education, Average Daily Attendance and Selected Financial Statistics of California School Districts 1965-66, pp. 134, 115 (1967); Allen, *The State, Educational Priorities, and Local Financing*, Integrated Education 55, 58-59 (Sept.-Oct. 1968).

York from $1,600 to $470.[7] See also Office of Education, HEW, Profiles in School Support 70-74 (1965). No discernible pattern underlies the differing levels of per-child public school expenditure within different districts of the state. A map of school district expenditure levels is a crazy quilt of fortuitous differentiation, because the state's investment in the public education of its children simply reflects haphazard variables of disparate local wealth.

iii. *Inequality in Education Offering.* What children receive in public schools is not money but education. Thus, the ultimate test of equal protection in public education looks beyond school district wealth and expenditures to the actual education offered to school children. Such scrutiny confirms the obvious: a child receiving a public school education at an annual expenditure level of $400-$500 is afforded schooling far inferior to the child for whom $1,000 is expended in a wealthier district. To some extent a poor district can compensate (at the price of inferior teaching capability) by paying lower salaries. Cost reduction is also achieved by having fewer teachers, thus suffering large and overcrowded classes with a reduced teaching and learning capability. Poorer districts also must forego facilities expensive to procure and maintain—libraries, laboratories, gymnasiums, special courses, remedial instruction, counseling, and the like. These disadvantages have been highlighted in a recent study by the Michigan Department of Education—"School Finance and Educational Opportunity in Michigan" (1968). Data there set forth (pp. 22-57) show the closest correlation between annual per-child expenditure levels and such education elements as class size, special classes and programs, teacher preparation, full-time principals, counseling services, research and testing, science laboratories, and library facili-

[7] Study Committee, Raising the Level of Public Education in Virginia 98-103 (1967); Horowitz and Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place within a State*, 15 U.C.L.A. L. Rev. 787, 806; Allen, *supra* n. 6 at 58.

ties. Similarly, a recent Virginia report revealing school district disparities of per-pupil expenditures as great as 7 to 1 demonstrates parallel disparities in the districts' number of classrooms with more than 30 students, and in the percentage of teachers with degrees and some form of certificates.[8] These correlations demonstrate the obvious truth that more money buys a better education. In sum, the available evidence shows that, as a consequence of existing school district malapportionment children in wealthier school districts receive a quality public education while those in poorer districts are offered cheap and inferior schooling.

iv. *Inferior Public Education for the Poor.* The ultimate paradox illumined by the pending case is that while children in the state's affluent areas enjoy high quality public education, the children of urban slums and rural poverty who have the greater need for quality education are condemned to suffer inferior public schooling. While members of state legislatures may not consciously intend it, because community wealth is the key determinant of the public education offered the inevitable consequence of the present system is that poor children most needy of a good public education are those most often denied it.

The economics of home ownership have produced great areas of wealth and poverty within the state. Where the wealthy live property values are high and a large taxable base exists for financing public schools. Conversely, the poor live where property values are the lowest and where, under the present system of malapportioned school districts, the least taxable property is available for public education. The poor are thus caught in a vicious circle where the offering of unequal public education in different school districts thrusts the disadvantages of the father upon the child. From public revenue the children of wealth obtain a first rate

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[8] Study Committee, *supra*, note 7 at 35-40, 47-49, 80-82, 98-103. See also A. Wise, *supra* note 5 at 136-38.

public education enabling them to go on to college, career, and continued affluence. Meanwhile, the children of the poor are afforded inferior public schools where they are discouraged from graduating, educated too poorly to enter college, and thus prepared only for a life of continued poverty. Under the present scheme of funding in Virginia and the majority of the states, public education perpetuates the prospects of a lifetime of poverty for the children of the poor.

* * * * * * *

The foregoing exposition underlines the multiple inequalities existing in public education in most of our states and highlighted in the present case—malapportionment of school district wealth, disparities in public school funding, inequality of public education, and inferior public education for children of the poor. Each of these inequalities presents a tangible constitutional question, and manifestly the confluence of all four raises a substantial equal protection issue. See *Reynolds* v. *Sims*, 377 U.S. 533; *Morey* v. *Doud*, 354 U.S. 457; *Brown* v. *Board of Education*, 347 U.S. 483, 493; *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 668.[9]

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[9] In urging that grave constitutional questions arise from inequality of public education in different districts within the state, we do not mean to suggest that similar inequalities as between states of the union would invoke constitutional doubts. To suggest that states vis-a-vis the federal government are analogous to local school districts vis-a-vis the state would be to defy the teaching of history and the nature of the federal union. In a similar setting involving malapportionment, this Court in *Reynolds* v. *Sims*, 377 U.S. 533, 574-575, recently rejected such an analogy in presently applicable terms:

> "The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government. Admittedly, the original 13 States surrendered some of their sovereignty in agreeing to join together 'to form a more perfect Union'. But at the heart of our constitutional system remains the concept of separate and distinct gov-

To the clear and compelling Constitutional issue presented in this case the ruling below gives no adequate answer. The District Court states that the existing inequality flows from "absence of taxable values [in appellants' school district] sufficient to produce the required moneys." But Virginia having chosen to operate a system of public schools, gross inequalities in the education thereby afforded do not escape the equal protection mandate simply because the state's school system has been made chiefly dependent on local taxes and thus incorporates local disparities in wealth. *There is no constitutional principal authorizing the state to perpetuate local poverty in the public school system.* Equally clearly, the District Court is in error in suggesting that it lacks the "knowledge" or "means" to require that pupils throughout Virginia "will enjoy the same educational opportunities". Educational equality, after all, was for many years judicially decreed and implemented in public school cases arising under *Plessy.* See *Brown* v. *Board of Education,* 347 U.S. 483, 486, n. 1.

In sum, the public education inequality here in issue is substantial and compelling, and the lower court's grounds for dismissal are unpersuasive. We are thus encouraged to believe that this Court will proceed to full review of the vital issue presented. Nevertheless, we must note one

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ernmental entities which have delegated some, but not all, of their formerly held powers to the single national government . . ."

"Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter* v. *City of Pittsburgh,* 207 U.S. 161, 178, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them,' and the 'number, nature, and duration of the powers conferred upon (them) . . . and the territory over which they shall be exercised rests in the absolute discretion of the state.' The relationship of the States to the Federal Government could hardly be less analogous."

last consideration suggested in the lower court's opinion which may be urged against such a course.

In the final paragraph of its opinion the District Court notes that the plaintiffs' "justified appeal for help" is now being examined by Virginia, and concludes that the General Assembly "undoubtedly" will come to the relief of Bath County "and other counties confronted with similar inequalities". Accordingly, we recognize that while disagreeing with the premises espoused by the District Court this Court might nevertheless decline to note probable jurisdiction because there are high prospects of prompt legislative relief. In that event, however, we suggest that the Court iterate the qualification that there is no prejudice to plaintiffs' right to reassert their Constitutional objection if within a reasonable period the Virginia legislature does not act. Such a qualification would serve to prevent undue *stare decisis* ramifications which may otherwise be attached in Virginia and elsewhere to this Court's action. Cf. dissenting opinion of Mr. Justice Marshall on Nov. 24, 1969 in *Hall* v. *Beals*, No. 39, October Term, 1969 (slip opinion at p. 1). While we cannot believe that this Court would dispose without argument and opinion of the weighty Constitutional issue concerning public education inequality, in view of the prevailing construction of a summary affirmance we urge the Court to make explicit the continuing vitality of the underlying question in the event that it should now decline full review of the merits.

Conclusion

It is submitted that probable jurisdiction should be noted.

Respectfully submitted,

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(8363-4)

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 864

ROBERT P. BURRUSS, ET AL., *Appellants*,

v.

WOODROW W. WILKERSON, STATE BOARD OF EDUCATION, ET AL., *Appellees*.

BRIEF FOR

National Education Association of the United States
The Lawyers' Committee for Civil Rights Under Law
The Urban Coalition

AS AMICI CURIAE

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BRIEF FOR

National Education Association of the United States
The Lawyers' Committee for Civil Rights Under Law
The Urban Coalition

AS AMICI CURIAE

In Support of the Jurisdictional Statement [1]

INTEREST OF AMICI

1. The National Education Association of the United States [NEA], founded in 1857, is a Corporation chartered by special Act of Congress in 1906. Its membership includes more than one million professional educators. Its purpose is to improve the character and advance the interests of the teaching profes-

[1] Counsel for Appellants have consented to the filing of this brief. Counsel for Appellees have indicated that they do not oppose its filing.

sion and to promote generally the cause of education in the United States. In furtherance of this purpose, the Association has long worked to insure the adequate and equitable financing of public education. For more than a century, NEA has striven to provide equal educational opportunity for all American children, in rural as well as in urban and suburban sections of the Nation.

2. The Lawyers' Committee for Civil Rights Under Law, a non-profit private corporation organized in 1963, is composed of over 300 lawyers across the country. In 1968, with the aid of a grant from the Ford Foundation, the Committee initiated a project to actively engage the services of lawyers in an attack upon problems in such areas as education, housing, and economic development. Well over 20,000 volunteer hours have been committed to over 600 projects. In the field of education, both national and local committees have undertaken more than a score of projects to promote quality education. For over a year, these committees have studied, reviewed, and proposed various provisions for reform of education financing. It is because of the importance of this case to the effort to bring about adequate systems of education financing that the Lawyers' Committee urges the Court to grant the requested relief.

3. The Urban Coalition, a private non-profit corporation, has established as one of its major objectives the extension of quality education, particularly to those students from disadvantaged backgrounds. Essential to this task is the removal of the gross inequities resulting from state education finance formulae which presently favor suburban areas at the expense of rural and urban areas. The present case challenges certain fea-

tures of the education financing system of the Commonwealth of Virginia. However, the factual pattern which the case presents and the important Constitutional issues it raises extend to States across the Nation. It is for this reason—because of the importance of this case to the future of American education—that the Urban Coalition requests this Court to grant the relief sought by Appellants.

QUESTIONS PRESENTED

1. Whether the District Court erred in dismissing Appellants' claim that the Equal Protection Clause of the Fourteenth Amendment is violated by certain specific features of the formula by which the Commonwealth of Virginia apportions its educational resources between the public school children of Bath County and similarly situated counties, on the one hand, and those in more affluent urban and suburban counties.

2. Whether the District Court erred in holding that the decision in *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd per curiam sub nom. *McInnis* v. *Ogilvie*, 394 U.S. 322 (1969), insulates from judicial scrutiny the statutory formula challenged here.

STATEMENT OF THE CASE

Appellants filed this civil proceeding in the United States District Court for the Western District of Virginia, Harrisonburg Division, seeking declaratory and injunctive relief with respect to the formula by which the Commonwealth of Virginia apportions aid among its public schools. The complaint alleged with particularity that the public school children of Bath County, Virginia, and similarly situated counties [hereinafter Appellants], were deprived of their rights under the Equal Protection Clause of the Fourteenth Amend-

ment as a result of the interplay of state law and the County's poverty.

On November 16, 1968, almost simultaneously with the District Court decision in *McInnis* v. *Shapiro,* 293 F. Supp. 327 (N.D. Ill. 1968), United States District Judge Ted Dalton held that Appellants were entitled to a three-judge court to pass upon the validity of their claims. (J.S. App. B) After taking testimony and other evidence with respect to the educational situation in Bath County and its relationship to the formula by which the Commonwealth of Virginia apportions educational resources, the three-judge court asked counsel for both sides to address themselves to the decision in *McInnis* and its per curiam affirmance by this Court, and to discuss possible judicial remedies for the conceded educational deficiencies found in Bath County. Counsel for appellees responded, resting their defense squarely and exclusively upon *McInnis.* Appellants filed a memorandum distinguishing *McInnis,* and proposing appropriate judicial remedies.

On May 27, 1969, the three-judge court filed its opinion, dismissing the complaint. (J. S. App. A) The court conceded the existence of "marked deficiencies of the Bath County School physical and instructional facilities, when compared with those of the other political subdivisions in Virginia." (J. S. 4a) But it concluded, following *McInnis,* that no relief was available. The court said that

> "[W]e do not believe that [the deficiencies and differences] are creatures of discrimination by the State. Our reexamination of the Act confirms that the cities and counties receive State funds under a uniform and consistent plan. With this conclusion we resolve the chief issue of the case, and exposition of the method of computation is not necessary. . . .

"Truth is, the inequalities suffered by the school children of Bath are due to the inability of the county to obtain, locally, the moneys needed to be added to the State contribution to raise the educational provisions to the level of that of some of the other counties or cities. The blame cannot be placed on the people or the officials of the county. Rather it is ascribable solely to the absence of taxable values sufficient to produce the required moneys. The tax rate and the appropriations have been strained to afford the children better schools." (J. S. 4a)

SUMMARY OF ARGUMENT

First, the state laws challenged below have the effect of depriving Appellants of their rights under the Equal Protection Clause of the Fourteenth Amendment. (1) These laws concededly deny to Appellants desperately needed state supplements to teachers' salaries, and other forms of state assistance, which are accorded to more affluent urban and suburban counties. (2) They reduce Appellants to the use of educational facilities branded "substandard" by state authorities, which may contribute to the system's lack of accreditation, and whose improvement, the Commonwealth admits, is beyond the County's resources. (3) And they make it impossible for Appellants to obtain *either* adequate vocational training *or* a curriculum broad enough to render graduates of the County's schools eligible to attend state institutions of higher learning. As a result, Bath County's young people are deprived of educational incentive and are relegated to poorly paid work as domestics or unskilled laborers, the County's Appalachian poverty is made self-perpetuating, and the gulf between rich and poor areas of the Commonwealth is maintained and widened.

Second, the present case affords a timely and appropriate vehicle for mitigating the chilling effect of the decision in *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd per curiam sub nom. *McInnis* v. *Ogilvie*, 394 U.S. 322 (1969). As the present case illustrates, the District Court decision in *McInnis*, and its summary affirmance by this Court, have induced lower federal and state courts indiscriminately to reject efforts to measure state formulae for financing public education by the requirements of the Equal Protection Clause. Until this Court indicates that its summary affirmance in *McInnis* was not intended to have this deadening effect, litigants, whether in Appalachia or in urban areas, will find it unduly difficult, if not impossible, to obtain the judicial relief to which they are entitled. We believe this case a highly appropriate vehicle for mitigating the overkill effect of *McInnis*.

ARGUMENT

I. The District Court erred in dismissing Appellants' claim that the Equal Protection Clause of the Fourteenth Amendment is violated by certain specific features of the formula by which the Commonwealth of Virginia apportions its educational resources between Appellants, on the one hand, and public school children in more affluent urban and suburban counties.

The District Court agreed that Bath County is a poor county, and that its poverty is related to the "deficiencies and differences" which characterize its educational system. And the court commended the County and its people for straining their own financial resources to the legal and practical maximum. (J. S. 4a) But the court concluded that because school districts in Virginia receive state funds "under a uniform and consistent plan," there was no violation of the

Equal Protection Clause of the Fourteenth Amendment. (*Ibid.*)

In this respect, the court was in error. Bath County, located in the southwestern portion of the state, is indeed a poor county.[2] As the record shows, nearly half of the County's families have an income of under $3000. (Tr. 27) Principal occupations are serving as domestics at The Homestead resort and working as laborers in the County's forests. The County has no public library, no theatres, no public tennis courts or golf courses, and no public swimming pools. (Tr. 70)

The County now taxes itself at the maximum level permitted by state law, and this year will spend 93 percent of its total tax revenues on its school system. (Tr. 104)

As a result of the interplay of the County's poverty and the way in which otherwise uniform and consistent state laws operate, Appellants are denied equal opportunities as compared to those afforded public school children in more affluent urban and suburban parts of the Commonwealth.

This brief will focus on several key discriminations resulting from the interplay of poverty and state law.

1. *Salary Assistance:* Because of its geographical location and its poverty, Bath County is unable to recruit a full staff of accredited teachers. In average teacher's salary, the County ranks 113th of 127 in Virginia. (Tr. 30) In percentage of teachers with advanced degrees, the County places 119th.

Instead of compensating for these inadequacies, Virginia law visits harsh financial penalties upon the

[2] An "Appalachian County" for purposes of the Appalachian Regional Development Act of 1965, P.L. 89-4, 79 Stat. 5, 40 U.S.C. —, App. § 1 et seq. See Tr. 21.

County because of them. The Commonwealth has legislated a state salary supplement in the amount of 60 percent of teachers' salaries—the principal form of state financial aid to public education. But state assistance is adjusted *downward* in relationship to the number of unaccredited teachers and to the extent that the number of students per class drops below 30 in elementary school and 23 in high school. 1968 Acts of Assembly, Ch. 806, Item 564. These penalty provisions presumably have the otherwise laudatory purpose of providing incentives for school districts to hire only accredited teachers and to use their resources efficiently.

But in the circumstances in Bath County, the incentive system not only breaks down, but works in reverse. Sixteen of the County's 53 teachers are unaccredited and therefore ineligible to receive any form of state salary supplement. (Tr. 15-16) And the County cannot aggregate the necessary number of students per classroom; the County is sparsely settled and carved up by beautiful but inconveniently placed mountains.[3] (Tr. 14-16) As a result, the state salary assistance program strips Bath County of desperately needed state funds—which *are* paid to more affluent school districts.

Other forms of salary assistance are likewise denied Bath County, but granted less needy school districts. Virginia, for example, provides a 60 percent supplement to salaries of principals (item 560), other supervisory personnel (item 557) and vocational training and other special teachers (item 558). But Bath County cannot afford principals or assistant principals in its elementary schools, and has no supervisors of

[3] The topography makes consolidation of school districts or schools not feasible.

instruction, vocational training teachers, or visiting specialists. (Tr. 15, 73-74) Nor is the County able to earn its share of state matching grants for vocational training equipment. (Tr. 73-74, 113) It is simply not affluent enough to gain access to state aid.

No one would suggest that Virginia could permissibly provide mortgage assistance to all homeowners, *provided* they live in $40,000 homes. The state supplement program is precisely analogous, and it is equally unconstitutional as applied to Bath County.

2. *Curriculum Deficiencies.* As a consequence of its own poverty and the partial denial to it of state salary and other assistance, the County is unable to offer a curriculum which will help break the cycle of poverty. Because of the lack of funds and the expensive nature of this kind of education, Bath County is unable to offer technical vocational training. (Tr. 74) Nor is it able to provide a curriculum which has a sufficient range of courses to entitle graduates of the County's schools to enter such state institutions of higher learning as William and Mary College (Tr. 79).[4] A great many institutions,[5] moreover, require applicants to come from accredited high schools, and the Bath County schools are unaccredited. See *Proceedings of 72d Annual Meeting of the Southern Association of Colleges and Schools*, Dallas, Texas, November 1967. As a result, students drop out in large numbers to take such dead-end jobs as caddying at The Homestead. (Tr. 78)

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[4] Bath County schools offer but 39.5 units compared to the statewide average of over 62, and a figure for Fairfax County of 137. (Tr. 30-31)

[5] We are advised, however, that Virginia's own state institutions accept accreditation by the Commonwealth itself, which Bath County schools have been given.

It was conceded below that it is not within the power of the County, unaided, to correct these curriculum deficiencies. We contend that so long as Virginia maintains institutions of higher learning open to high school graduates who have taken the required courses, it must insure that schools in each and every county offer at least the curriculum necessary to meet the entrance requirements set by such state institutions. See *Rogers* v. *Paul*, 382 U.S. 198 (1965); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Sipuel* v. *Board of Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938). As this Court said in *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954), "[W]here the State has undertaken to provide [public education, it] is a right which must be made available to all on equal terms."

3. *School Plant*: Bath County, as a result of its poverty, is forced to use a substantial number of educational facilities which the Commonwealth's own experts have ruled "substandard". These include school cafeterias with earthen floors! Since adequate school plant is one of the criteria which determine a school system's accreditation,[6] the deficiencies in Bath County's school plant may be a factor in rendering its graduates ineligible for admission to some institutions of higher learning. Affluent counties, able to raise funds for school construction, receive some state assistance with respect to interest costs. (Tr. 147) But the Commonwealth provides no funds for construction of local school facilities—even to eliminate concededly "substandard" facilities. Here again, state law aids the rich while declining to aid the poor.

* * *

[6] United States Office of Education, Approval and Accreditation of Public Schools, p. 15 (1960).

Certainly it cannot be said that the Court below subjected these discriminatory effects to the "careful examination . . . warranted where lines are drawn on the basis of wealth. . . ." *McDonald* v. *Board of Election*, 394 U.S. 802 (1969); *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 670 (1966); *Douglas* v. *California*, 372 U.S. 353 (1963).

Each of the aforementioned evils is susceptible of remedy by a simple, easily enforceable court order. (1) The District Court should suspend application to Bath County and similarly situated counties of the penalty provisions whose effect is to deprive the County of its share of state salary assistance. The Commonwealth should be required to provide 60 percent of teachers' salaries here, just as it does in Fairfax and in other affluent counties, without regard to the number of unaccredited teachers or to deviations in class size. These are concededly circumstances not within the County's control, and may not be made the basis for penalizing the County financially. (2) Similarly, Virginia should be required to do whatever is necessary, providing special funds or visiting faculty, in order to enable the County to offer a curriculum which will at least make its high school graduates eligible to meet the entrance requirements set by William and Mary College, and like state institutions. (3) Finally, it should be required to provide the funds necessary to correct conceded deficiencies in Bath County's physical facilities, at least to the extent these affect the system's accreditation.

II. The District Court erred in concluding that the decision in McInnis and its summary affirmance by this Court insulate from judicial scrutiny the statutory formula challenged here.

One of the most distressing circumstances to those working to improve the quantity and quality of American education is the way in which *McInnis* and its summary affirmance by this Court have been held to shut the door to efforts to challenge state formulae for apportioning educational resources. The present case is but one example of the unnecessarily chilling effect of *McInnis*.[7]

Although we did join as *amici* to urge this Court to note probable jurisdiction in *McInnis*, it is not necessary for us now to quarrel with the decision reached there. *McInnis* is easily distinguishable from the present case, despite the reluctance of lower courts to observe the distinctions.

1. *McInnis* was a decision on a bare complaint, supplemented only by legal memoranda; no factual materials were adduced. In the present case, on the other hand, a full set of facts was put into the record, including abundant documentation, live testimony and factual concessions by the Commonwealth.

2. In *McInnis*, the court rejected what it deemed the "nebulous concept" under which plaintiffs there sought to require allocation of state funds solely on the basis of the "educational needs" of students. The

[7] In addition to the present case, see *Serrano* v. *Priest*, No. 938254, Calif. Super. Ct. (L.A. Co. 1969), dismissed on the basis of the lower court decision in *McInnis*. Moreover, cases in other jurisdictions, at least in part, are not being filed or pressed for fear *McInnis* will lead to their quick dismissal. See, e.g., *Board of Educ. of City of Detroit, Mich.* v. *Michigan*, No. 103342, Circuit Ct. for Wayne County, Mich.; *Rodriquez* v. *San Antonio Independent School District*, No. 68-175 S.A. (W.D. Tex.); *Bellow* v. *Wisconsin*, No. — , Dane County Cir. Ct., Wis.

District Court concluded that it lacked the means to ascertain what those needs were, and the ability to fashion a decree to implement such a standard. In the present case, on the other hand, Appellants ask only that they not be penalized because of the poverty of the County. Bath County should receive only the same state salary assistance that more affluent counties receive—without regard to penalties triggered by the County's poverty. The Commonwealth should insure that Bath County is able to offer a curriculum which at least equips graduates to apply for admission to William and Mary College and like state institutions, and that the County's physical facilities are raised to levels which the Commonwealth's own inspectors will concede to be not "substandard."

3. In *McInnis*, the District Court emphasized that Illinois guaranteed that each school district would expend at least $400 per pupil, and that the legislature periodically raised the floor. Virginia guarantees no such minimum expenditure per pupil.[8] And its legislature, as the record here demonstrates, has steadfastly rejected recommendations by distinguished commissions that it do more for poor school districts.[9]

5. The *McInnis* court observed that under the Illinois statutory scheme, each school system has an opportunity to choose what portion of local revenues are to be devoted to education as opposed to other public needs. It held this decision "reasonable, especially since the common school fund assures a minimum of $400 per student." 293 F. Supp., at 333.

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[8] This statement must be qualified. In the unlikely event that the Commonwealth's contribution of 60 percent of salaries yields less than $110 per pupil, that amount will be furnished in lieu of teacher aid.

[9] See, e.g., the Turner Commission Report of 1967.

Here, not only does the Commonwealth provide Bath County with no such $400 floor, but the County will this year spend 93 percent of all local revenues on education, is already taxing itself at the maximum level permitted by state law, and therefore does not have the luxury of choosing between education and other public needs. Even the County's single-minded concentration on education leaves it woefully short of educational funds.

In sum, *McInnis* and the present case are worlds apart. Here Appellants proceed on an entirely different theory, focusing on equal educational opportunities and facilities rather than arguably difficult-to-define student educational needs. Here, the interplay of Virginia's statutory formula and Bath County's poverty is well documented, and indeed is conceded.

We do not, of course, know why this Court declined to review *McInnis*. It may have balked at the lack of a factual record. It may have been troubled by the request that it relate state educational expenditures to the "educational needs" of students. It may have been influenced by the $400 per pupil floor guaranteed by the state legislature to all school districts. Or it may have been persuaded that the Illinois legislature was facing up to the State's educational needs.

Whatever the reasons, none of them applies to the present case, and the Court below was in error in following *McInnis*.[10] We believe that it is vital that this Court now make clear that *McInnis* was not intended to shut the door to judicial review of all formulae by which the states apportion funds among school districts. *McInnis* has already had a substantial

[10] Of course, even if *McInnis* were squarely in point, this Court would not be precluded by its summary affirmance in that case from setting this one for plenary review. *See The Sunday Law Cases*, 366 U.S. 420, 511, (1961).

chilling effect on school litigation. The present case is, we believe, a highly appropriate one for demonstrating that the courts *are* open to measure state formulae for apportioning educational resources by the standards of the Equal Protection Clause.

CONCLUSION

We believe the record in this case requires reversal of the decision of the District Court and the entry of appropriate relief. Should the Court not wish to undertake the latter step, we believe it would be a substantial service to American education and especially to the school children of rural counties like Bath, were this Court simply to remand to the District Court with instructions to fashion relief so as to prevent the interplay of poverty and state law from violating the Fourteenth Amendment rights of the children.

Respectfully submitted.

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SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1969

No. 864

ROBERT P. BURRUSS, VIRGINIA R. BURRUSS, JAMES C. TENNANT, JAMES L. TENNANT, ET AL.,

Appellants,

v.

WOODROW W. WILKERSON, STATE BOARD OF EDUCATION, ET AL.,

Appellees.

On Appeal from the United States District Court for the Western District of Virginia, Harrisonburg Division

MOTION TO DISMISS OR AFFIRM WITH APPENDIX

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PRELIMINARY STATEMENT

Pursuant to Rule 16, the Appellees file their motion to dismiss this appeal or, in the alternative, to affirm the judgment of the three-judge court entered pursuant to its opinion of May 23, 1969.

STATEMENT OF THE CASE

Appellants are parents and the children of such parents, all being residents of Bath County, Virginia, such children being enrolled in the public schools of Bath County.

Appellees are the Superintendent of Public Instruction of the Commonwealth, the Comptroller of the Common-

wealth, the State Treasurer, the Clerk of the State Senate, the Clerk of the House of Delegates and the State Board of Education.

The allegations of the "Motion for Declaratory Judgment" filed in the court below are as follows, with paragraph numbers of the Complaint as indicated:

Under Section 129 of the Virginia Constitution, the Commonwealth has assumed and is charged with the establishment and maintentnce of an efficient system of free schools throughout the state (6) and having undertaken this duty as required by the equal protection clause of the Fourteenth Amendment of the United States Constitution to dischrarge this responsibility on an equal basis for all children in the state. (7)

Under Section 135 of the State Constitution, the State has enacted the Basic State School Aid Fund (8), and in compliance with Section 129 has distributed funds as set forth in the formula (presumably the formula under the Basic State School Aid Fund Act), has lent money from the State Literary Fund, and has distributed sales taxes. (9)

The Bath County Board of Supervisors has levied real estate, personal property, and sales taxes and has sold bonds to supply the major share of the school operational funds and capital expenditures. Under Section 136 of the State Constitution this action on the part of the Board of Supervisors is authorized but is discretionary. (10)

The apportionment of State funds to localities has resulted in the existence of substantial disparity between the quality of education and the extent of available educational facilities and services in Bath County and in other localities. (11) As a result, the children of Bath County are deprived of educational opportunities available to children in other localities of the State and are denied equal opportunity to education through public schools when com-

pared to the opportunities available to children in other cities and counties. (12) The same effects result directly from the method employed by the State in the distribution and apportionment of State funds, and by this apportionment of State funds the State violates the rights of plaintiff children to equal protection of the law in violation of the Fourteenth Amendment. (13)

The Basic State School Aid Fund Act, and particularly its formula for apportionment of State funds, creates a condition denying the plaintiff children educational opportunities equal to those enjoyed by children in public school in other districts of the State and is, therefore, repugnant to the equal protection clause of the Fourteenth Amendment in the following respects: (i) fails to relate to educational needs and the acuteness thereof and fails to take into account any factors which would tend to equalize educational opportunities, (ii) fails to correct differences in quality of physical facilities, (iii) fails to take into account differences in levels of school construction costs, salaries, and other expenses which prevail in different areas of the State, and (iv) fails to take into account the added cost of providing substantially equal educational opportunities to children who live in extremely disadvantaged rural areas and who lack preschool background and extracurricular experiences. (14)

The General Assembly has failed in its duty to maintain an efficient school system throughout the State in that Bath County schools are deficient in the following respects: (i) Insufficient number of schools with adequate buildings and equipment, (ii) Insufficient number of qualified teachers, (iii) Insufficient course offerings when compared with schools in other localities, (iv) System deficient in the basic facilities, services and other basic matters, and (v) Graduates of the system enter adult life with an initial dis-

advantage (15). As a result, students in Bath County are denied their right to equal protection and are denied equal opportunity to an education which would allow them to compete on an equal basis with graduates of school systems in other counties and cities. (16)

The Appellants prayed in the court below:

(A) That the act and formula be declared void and without force and effect as repugnant to the equal protection clause of the Fourteenth Amendment.

(B) That jurisdiction be retained to afford the General Assembly of Virginia a reasonable time to reapportion school funds in a manner which will provide substantially equal educational opportunities for all children in the Commonwealth; and should the legislature fail to do so, that the Court enter its order apportioning the school funds in a manner satisfactory to the fulfillment of the obligations undertaken by the Commonwealth and complying with the equal protection clause of the Fourteenth Amendment.

(C) That the Court enter judgment that the General Assembly has failed to comply with Section 129 of the State Constitution and with the equal protection clause of the Fourteenth Amendment.

(D) That the Court retain jurisdiction to afford the General Assembly a reasonable time to establish and maintain an efficient free public school system in Bath County, which will provide substantially equal educational opportunities for all children of the Commonwealth, and should the General Assembly fail to do so, that the Court enter its order so doing.

(E) That the Court enjoin the Superintendent of Public Instruction, the Comptroller, the Treasurer, and the State

Board of Education and their agents from further disbursement from the School Fund under the Act.

In the court below, the Appellees filed a Motion to Dismiss on the grounds, among others, that (1) the complaint failed to state a claim upon which relief can be granted, and (2) the court lacked jurisdiction to order affirmative relief requested by the Appellants.

The court below overruled the Motion to Dismiss and subsequent thereto an answer was filed denying all facts alleged in the complaint except the identity and status of the Appellees which were admitted.

The Appellants took depositions and introduced numerous exhibits. By stipulation of counsel, these were made part of the record in the court below.

The formula for the distribution of the Basic State School Aid Fund which is under attack in this case recognizes the principles of need, effort and ability. It may be applied to any increased appropriation by the General Assembly of Virginia in support of a program raising the level of public education (Exhs. 7 and 8).

As set forth in *Shepheard v. Godwin*, 280 F.Supp. 869, 872-873, beginning in 1948, this Minimum Education Program was established by the legislature. It represented a program to provide each child in the Commonwealth of Virginia with a minimum education. The Basic State School Aid Fund was thus created to fix a minimum program cost for every school district in the State.

This minimum program cost is now determined to be the aggregate of (1) the amount of instructional salaries under a stated formula for each teacher position and of (2) the product of the average daily attendance (ADA) multiplied by $110.00 per pupil. Every school district is required to expend at least this total each year.

The State contribution is comprised of a basic State share and a supplementary State share. The basic State share is 60% of the instructional salaries and the supplementary share is arrived at by subtracting from the minimum program cost (the gross instructional salaries plus the total of $110.00 per pupil ADA) the basic State share and an amount equivalent to a uniform tax levy of $.60 per $100.00 of true values of local taxable real estate and public service corporation property in the school district. (See Exh. 8 for a detailed explanation of the formula).

It is interesting to note that the ADA was multiplied by $80.00 in 1964-66 and by $100.00 in 1966-68 thus indicating the continuing desire of the General Assembly of Virginia to raise the level of public education. (Exhs. 7 and 14).

As the court below found, there are deficiencies and differences in the Bath County school facilities when compared with those in some of the more affluent political subdivisions in Virgina. This, of course, is the obvious result of decentralization. However, neither the virtues nor the validity of decentralization have been questioned. See also *McInnis v. Shapiro*, 293 F.Supp. 327, 333.

Though the facts are not really in issue, the Appellees cannot permit some of the misstatements and misleading implications contained in the Jurisdictional Statement of the Appellants and in the *amici curiae* briefs to go unnoticed.

For example, the brief of the National Education Association, et al., states that in Bath County there are "school cafeterias with earthen floors" (page 10). The record in this case does not sustain such a statement and, in fact, it is a false statement.

It is also stated that Bath County now taxes itself at the maximum level permitted by State law and during this

school year will spend 93% of its total tax revenues on its school system. While it is true that the limitation on the regular school tax has been reached by Bath County and by all Virginia counties under § 22-126 of the Code of Virginia; § 22-127 of the Code of Virginia permits the County to appropriate other money from the general county levy. (Tr. pages 157-158).

For the current school year, the testimony was that the anticipated revenues of Bath County for the year beginning July 1, 1969, were $570,420.00 and of that amount $462,000.00 was to be allocated to the schools (Tr. p. 104). This would mean that Bath County will spend approximately 80% of its revenues on its school system, and not 93% as alleged.

As to teacher salaries and accreditation, it should be noted that 50% of the counties in Virginia have lower salary schedules and at least one such county has 100% certified teachers (Tr. pp. 49-50). In Bath County those who had not been issued normal professional certificates were older teachers and were well qualified (Tr. p. 57).

It was also conceded by the Superintendent of Schools that his salary scale for teachers compares very well with other counties in Virginia and that he was in a competitive position as to employment of teachers (Tr. p. 155).

The Superintendent of Schools answered "no" to the question concerning whether a graduate of the two high schools in Bath County could "get into every school in this State" but could point to only one college under State control, The College of William and Mary. He also pointed to only three other schools. These were expensive private colleges for girls. (Tr. p. 79). The Superintendent failed to mention that there were ten other four-year colleges and universities under State control and many two-year com-

munity colleges. Also, it should be noted that there are twenty-two private four-year colleges in Virginia and twelve junior colleges (Exh. 2-B).

Further, the curriculum at both high schools meets the present State accreditation standards (Exh. 11) and the Superintendent testified that eight out of the fifteen graduates of the small high school in Bath County went to college last year (Tr, p. 14). The county average in Virginia of 1967 high school graduates attending college was 46% (Exh. 3-A).

During 1967-68 based on 1966 real estate and public service corporation values, Bath County ranked 22nd in ability to support a school system out of the 130 county and city school districts. However, Bath County ranked only 109 among the counties and cities in effort (Exh. 3-A, p. 6).

Bath County's Public school indebtedness as of January 1, 1967, was only $108,300.00. This was the lowest of the 96 Virginia counties with the exception of Powhatan County with a debt of $105,900.00 and the Counties of Cumberland and Patrick which had no public school indebtedness (Exh. 7, pp. 93-96).

THE STATUTE INVOLVED

The Appellants complain of the distribution of the Basic State School Aid Fund which is found as Item 564 of the Appropriation Act of 1968 (Acts of Assembly, Vol. 2, 1968, page 1486). This Act is found as Appendix B of the Appellants' Jurisdictional Statement.

THE ISSUES PRESENTED

1. Does the Fourteenth Amendment require that public schools expenditures be made only on the basis of educational needs of the students; and

2. Does the lack of judicially manageable standards make this controversy nonjusticiable?

ARGUMENT

For the purposes of this Motion the Appellees rely upon the case of *McInnis* v. *Shapiro*, 293 F.Supp. 327 (N.D. Ill. 1968) aff'd (per curiam) *sub nom. McInnis* v. *Ogilvie*, 394 U.S. 322 (March 24, 1969).

It is the Appellees' contention that the decision of the three-judge District Court of Illinois affirmed by this Court controls the issues presented in this case.

The method of financing public education in the State of Illinois is similar in all material respects to the method used in this State. Section 1 of Article VIII of the Constitution of Illinois directs the legislature to "provide a thorough and efficient system of free schools, whereby all children of this State may receive a good common school education." In Section 129 of the Virginia Constitution it is likewise provided that "the General Assembly shall establish and maintain an efficient system of public free schools throughout the State."

In fulfilling its constitutional mandate, the Illinois General Assembly delegates authority to local school districts to raise funds within the district by levying taxes for educational and building purposes. See, Ch. 122, § 17-1 *et seq.*, Ill. Rev. Stat. (1967). The General Assembly of Virginia does likewise. See, §§ 22-126 and 22-127 of the Code of Virginia.

The Illinois legislature authorizes school districts to issue, subject to referendum, bonds for the purpose of construction and repair of schools and school property. See, Ch. 122, § 19-1 *et seq.*, Ill. Rev. Stat. (1967). Sections 15.1-175 and 15.1-185 of the Code of Virginia provide for the issuance of bonds by localities for school construction.

Section 18-1 *et seq.*, Ill. Rev. Stat. (1967), establishes a common school fund and provides for its apportionment to the various school districts by the Superintendent of Public Instruction. The Illinois apportionment formula is set forth in § 18-8 of Ch. 122. The minimum program is based upon average daily attendance and the local share is based upon assessed values of real estate. This, of course, is similar to the Virginia formula which is found as Item 564 of the Appropriation Act of 1968, page 1480.

The qualifying rate for the school district to participate in Illinois' school equalization fund is $.74 per $100.00. See, § 18-8, Ill. Rev. Stat. (1967). The qualifying rate for such participation in Virginia is $.60 per $100.00. See, Item 564 of the Appropriation Act of 1968.

As pointed out in *McInnis*, 293 F. Supp. at pp. 330 and 333, the State of Illinois guarantees a flat grant to local school districts. The Commonwealth of Virginia does likewise by guaranteeing 60% of salaries of teachers in State aid positions based on the State minimum scale. See, Item 564, Appropriation Act of 1968, page 1480.

An examination of the School Code of Illinois and the School Code of Virginia also reveals that both states provide special aid funds to local school districts in such fields as transportation, special education, vocational education and teacher retirement.

To facilitate comparison of the Virginia and Illinois methods of financing public education the following is submitted as a summary of what is said above:

Requirements for and Methods of Financing Public School Education

1. The State Constitution requires the legislatures to

In Illinois — "Provide a thorough and efficient system of free schools" (Sec. 1, Art. VIII, Constitution)

In Virginia—"The General Assembly shall establish and maintain an efficient system of public free schools throughout the State." (§ 129 of Constitution)

2. General Assembly delegates authority to local school districts to raise funds within the district

In Illinois—Ch. 122, § 17-1 *et seq.* Rev. Stat. (1967)

In Virginia—§§ 22-126 and 22-127 of Code

3. School districts may issue bonds for school construction, etc.

In Illinois—Ch. 122, § 19-1 *et seq.* Rev. Stat. (1967)

In Virginia—§§ 15.1-175 and 15.1-185 of Code

4. Apportionment formulas for distribution of state funds

In Illinois—Ch. 122, § 18-8

In Virginia—Item 564, Appropriation Act of 1968

5. Elements of the formulas:

a. Minimum program based on average daily attendance

In Illinois—Ch. 122, § 18-8 Rev. Stat. (1967)

In Virginia—Item 564, Appropriation Act of 1968

b. Local share based on assessed value of real estate

In Illinois—Ch. 122, § 18-8 Rev. Stat. (1967)

In Virginia—Item 564, Appropriation Act of 1968

c. The qualifying rate for a school district to participate in school equalization fund

In Illinois—$.74 per $100, Ch. 122, § 18-8 Rev. Stat. (1967)

In Virginia—$.60 per $100, Item 564, Appropriation Act of 1968

d. A flat grant is guaranteed to local school districts*

In Illinois—*McInally v. Shapiro*, 293 F. Supp. at pp. 330 and 333

In Virginia—Item 564, Appropriation Act of 1968

6. Special aid funds, such as transportation, special education, vocational education and teacher retirement are provided by the state.

In Illinois—See generally, the School Code of Illinois

In Virginia—See generally, Virginia School Laws and Appropriation Act of 1968

* Illinois' minimum is $400.00 per pupil in ADA. Virginia's minimum is 60% of qualifying teachers' salaries plus $110.00 per pupil in ADA.

In addition, the allegations made by the plaintiffs in *McInnis* are similar to the contentions of the Appellants in the instant case. A copy of the complaint filed in *McInnis* is attached as an appendix to this Motion.

The following shows the similarities of the complaints:

Allegations in Complaints

1. There exist material disparities in the quality of educational programs, facilities and services in the various school districts.
In Illinois Case—Paragraph 15 of Complaint
In Virginia Case—Paragraphs 11 and 12 of Complaint

2. There exist material disparities in the levels of educational attainment achieved by students in different school districts.
In Illinois Case—Paragraphs 16 and 17 of Complaint
In Virginia Case—Paragraph 16 of Complaint

3. The method of financing fails to relate to educational needs of students.
In Illinois Case—Paragraph 18a of Complaint
In Virginia Case—Paragraph 14.1(c) of Complaint

4. The method of financing fails to consider geographical variations in school needs, school construction costs, teacher and professional salaries and other similar costs.
In Illinois Case—Paragraph 18b(1) of Complaint
In Virginia Case—Paragraph 14.3 of Complaint

5. The method of financing fails to consider the added costs necessary to educate those children from culturally and economically deprived areas.
In Illinois Case—Paragraph 18b(2) of Complaint
In Virginia Case—Paragraph 14.4 of Complaint

6. The method of financing fails to provide to each child an equal opportunity for an education.
In Illinois Case—Paragraph 18c of Complaint
In Virginia Case—Paragraphs 12, 13 and 14 of Complaint

It is to be remembered that *McInnis* was disposed of on a Motion to Dismiss affirmed by this Court. This is the position in which this case is found.

Appellants and *amici curiae* have made tortured efforts to distinguish the cases in both of which the strikingly similar allegations were taken as conceded in the court below. The evidence taken and cited by Appellants is nothing more than affirmance of the allegations of the complaint. In fact, the court below said in reference to *McInnis*:

> "... The circumstances of that case are scarcely distinguishable from the facts here. Virginia's division of school funds closely paralleling Illinois'." (p. 5a of Appendix to Jurisdictional Statement.)

Because of the similarities in the financing of Illinois' public schools and of Virginia's public schools and because of the similarities of the allegations contained in the complaints, the Appellees again submit that *McInnis* disposes of the issues here presented.

A

The Fourteenth Amendment Question

It was concluded in *McInnis* that the Fourteenth Amendment does not require that distribution of educational funds to the various school districts be made only on the basis of educational need. In this connection, District Judge Decker said for the three-judge Court:

> "Without doubt, the educational potential of each child should be cultivated to the utmost, and the poorer school districts should have more funds with which to improve their schools. But the allocation of public revenues is a basic policy decision more appropriately handled by a legislature than a court. To illustrate, the following considerations might be relevant to a financ-

ing scheme: state-wide variations in costs and salaries, the relative efficiency of school districts, and the need for local experimentation.

"As stated in Metropolitan Casualty Insurance Co. v. Brownell, 294 U.S. 580, 584, 55 S.Ct. 538, 540, 79 L.Ed. 1070 (1935):

> '[T]he burden of establishing the unconstitutionality of a statute rests on him who assails it. . . . A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.'

"And more recently, the Supreme Court declared that:

> '[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.'

"McGowan v. Maryland, 366 U.S. 420, 425-426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961). See also Salsburg v. Maryland, 346 U.S. 545, 552-553, 74 S.Ct. 280, 98 L.Ed. 281 (1954).

"Tested by these standards, the existing school legislation is neither arbitrary nor does it constitute an invidious discrimination. It therefore complies with the Fourteenth Amendment." (293 F. Supp. at page 332.)

The three-judge court below likewise found Virginia's distribution formula was not arbitrary, saying:

> "Our reexamination of the Act confirms that the cities and counties receive state funds under a uniform and consistent plan." (p. 4a of Appendix to Jurisdictional Statement.)

B.

The Controversy Is Not Justiciable

As to the issue of whether or not the controversy is justiciable, the court below found:

> "... the courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the State. We can only see to it that the outlays on one group are not invidiously greater or less than that of another. No such arbitrariness is manifest here." (p. 5a of Appendix to Jurisdictional Statement)

The soundness of the view of the court below is illustrated by the following quotation found in Professor Philip B. Kurland's article, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined":

> "... Given even the least complex measure of the proper standard of equality, dollar equivalence, how can it [the Court] bring about the necessary change? For the principle calls for a fundamental revision of state governmental structure.
>
> "The Court, therefore, cannot leave with the local unit the discretion as to how much it is to tax its constituents and what portion of that amount is to be devoted to educational purposes. Will it then command that all educational expenditures shall be made by the state and no local government unit shall supplement that grant. Will it tell the state how it shall raise the necessary revenues?
>
> "Assuming it manages a transfer of responsibility for educational systems to the central government of the state, will it fix a minimum that must be spent on each pupil? If not, but if the amount fixed by the state legislature is above the minimum theretofore prevailing, will the state be able to provide those educational facilities in public schools that are now available

in its best school systems? If not, will there be some way of keeping the children of the more affluent groups within the public school systems? If the more affluent groups remove their students from the public school systems, will the notion of equality as a means of protecting the poor be effective? (As of the moment, for example, the community in the neighborhood of the University of Chicago is about as heavily taxed for educational facilities as even the more affluent northern suburbs. But the children of the community are to a very large extent receiving their formal education through private schooling.) Would a single standard, throughout the state, but a low one, not be the inevitable result of efforts by the Court to dictate the means of achieving equal educational opportunity?" 35 U. of Chi. L. Rev. 583, 597-598.

Likewise, the three-judge Court in *McInnis* concluded that it was not justiciable saying:

"Even if the Fourteenth Amendment required that expenditures be made only on a basis of peoples' educational needs, the controversy would be non-justiciable. While the complaint does not present a 'political question' in the traditional sense of the term, there are no 'discoverable and manageable standards' by which a court can determine when the Constitution is satisfied and when it is violated.

". . . Even if there were some guidelines available to the judiciary, the courts simply cannot provide the empirical research and consultation necessary for intelligent educational planning. As early as 1919 Mr. Justice Holmes explained that 'the Fourteenth Amendment is not a pedagogical requirement of the impracticable.' " (293 F.Supp. at 335-336)

In summary, the present Virginia method of financing public schools reflects a rational policy consistent with the provisions of the Virginia Constitution for the same reasons

that the Illinois method does as set forth in *McInnis*. The conclusions reached there are equally applicable here.

> ". . . Unequal educational expenditures per student, based upon the variable property values and tax rates of local school districts, do not amount to an invidious discrimination. Moreover, the statutes which permit these unequal expenditures on a district to district basis are neither arbitrary nor unreasonable.
>
> "There is no Constitutional requirement that public school expenditures be made only on the basis of pupils' educational needs without regard to the financial strength of local school districts. Nor does the Constitution establish the rigid guideline of equal dollar expenditures for each student." (293 F.Supp. at page 336)

CONCLUSION

For the reasons stated, the Appellees respectfully submit that this case should be dismissed or, in the alternative, the judgment of the court below should be summarily affirmed.

Respectfully submitted,

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IN THE

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action
No. 68C 673

LINDA MCINNIS, a minor, by CLOTEE MCINNIS, her mother and next friend, MATTHEW V. BOWDEN, a minor, by MRS. FLORENCE JOHNSON, his mother and next friend, LAVERN SMITH, a minor, by BERNICE SMITH, his mother and next friend, KIMBERLY RAY COBLER, a minor by RALPH COBLER, her father and next friend, MARK FIELDS, a minor, by MRS. LOUISE ALEXANDER, his mother and next friend, WILLIAM ALEXANDER, a minor, by MRS. LOUISE ALEXANDER, his mother and next friend, VIRGINIA RUTH SCRUGGS, a minor, by MRS. VIRGINIA SCRUGGS, her mother and next friend, all suing as individuals and as representatives of persons similarly situated, and Concerned Parents and People of the West Side, suing in behalf of the members of the class,

Plaintiffs,

v.

OTTO KERNER, Governor of the State of Illinois, RAY PAGE, Superintendent of Public Instruction of the State of Illinois, ADLAI E. STEVENSON, III, Treasurer of the State of Illinois, MICHAEL J. HOWLETT, Auditor of the State of Illinois,

Defendants,

COMPLAINT

Plaintiffs, LINDA MCINNIS, a minor, by CLOTEE MCINNIS, her mother and next friend, MATTHEW V. BOWDEN, a minor, by MRS. FLORENCE JOHNSON, his mother and next friend, LAVERN SMITH, a minor, by BERNICE SMITH, his mother and next friend, KIMBERLY RAY COBLER, a minor, by RALPH COBLER, her father and next friend, MARK FIELDS, a minor, by MRS. LOUISE ALEXANDER, his mother and next friend, WILLIAM ALEXANDER, a minor, by MRS. LOUISE ALEXANDER, his mother and next friend, VIRGINIA RUTH SCRUGGS, a minor, by MRS. VIRGINIA SCRUGGS, her mother and next friend, all suing as individuals and as representatives of persons similarly situated, and Concerned Parents and People of the West Side, suing in behalf of the members of the class, by their attorneys, CECIL C. BUTLER, EDWARD G. THOMSON, ZANE M. COHN and CURTIS HEASTON, complain of Defendants, OTTO KERNER, Governor of the State of Illinois, RAY PAGE, Superintendent of Public Instruction of the State of Illinois, ADLAI E. STEVENSON, Treasurer of the State of Illinois, MICHAEL J. HOWLETT, Auditor of the State of Illinois, and respectfully represent to this Honorable Court as follows:

1. This is a civil action on behalf of individual plaintiffs and all others similarly situated for (i) a judgment declaring unconstitutional those portions of Ill. Rev. Stat. 1967, Ch. 122, §§ 17-2 through 20-9, 32-1 through 32-7.3 and 34-22 *et seq.* which provide for and permit unequal per pupil expenditures for the education of Illinois school children, (ii) a preliminary and permanent injunction forbidding the defendants from continued enforcement of and reliance upon these statutory provisions, (iii) a declaratory judgment and a permanent injunction requiring defendants to submit to the court a plan for financing public educa-

tion consistent with the rights of plaintiffs under the Constitution of the United States of America and of the State of Illinois.

2. This cause of action arises under 42 U.S.C. §§ 1983 and 1988. The jurisdiction of this court is invoked pursuant to these provisions and to 28 U.S.C. § 1343. A declaratory judgment is sought pursuant to 28 U.S.C. §§ 2201 and 2202.

3. The action seeks an injunction having statewide effect against the continued enforcement and operation of statutes of the State of Illinois on the ground of their unconstitutionality. Therefore, application is hereby made for the convening of a three-judge Federal District Court to hear and determine this mattetr pursuant to 28 U.S.C. §§ 2281 and 2284.

4. Plaintiffs are all citizens of the United States of America and of the State of Illinois, who are enrolled in and attending public schools operated by the Boards of Education of the respective school districts, and are more particularly identified as follows:

a. Plaintiff, LINDA MCINNIS, is a minor and brings this action by her mother and next friend, CLOTEE MCINNIS. LINDA MCINNIS resides within the City of Chicago under the jurisdiction of Cook County District No. 299 and within District 7 of said District. LINDA MCINNIS has for two and one-half years attended Waller High School within Cook County District No. 299, has completed the first two and one-half years of high school and with the Fall term of 1968 will in the normal course enter the senior curriculum of said Waller High School.

b. Plaintiff, MATTHEW V. BOWDEN, is a minor and brings this action by his mother and next friend, MRS. FLOR-

ENCE JOHNSON. MATTHEW V. BOWDEN resides within the City of Chicago under the jurisdiction of Cook County District No. 299 and within District 2 of said District. MATTHEW V. BOWDEN has for one and one-half years attended Sullivan High School within District 2 of Cook County District No. 299, has completed the first one and one-half years of high school and commencing with the Fall term of 1968 will in the normal course enter the junior curriculum in said Sullivan High School.

c. Plaintiff, LAVERN SMITH, is a minor and brings this action by his mother and next friend, BERNICE SMITH. LAVERN SMITH resides within the area under the jurisdiction of Cook County District No. 299, and within District 10 of said District. LAVERN SMITH has for three and one-half years attended Crown Elementary School within District 10 of Cook County District No. 299, has completed the first five and one-half years of elementary school, and commencing with the Fall 1968 term will in the normal course enter the seventh grade in said Crown Elementary School.

d. Plaintiff, KIMBERLY RAY COBLER is a minor and brings this action by her father and next friend, RALPH COBLER. KIMBERLY RAY COBLER resides in Posen, Illinois within the area under the jurisdiction of Cook County District No. 143½ KIMBERLY RAY COBLER has for one and one-half years attended Posen Elementary School within Cook County District No. 143½, has completed two an one-half years of elementary school, and commencing with the Fall 1968 term will in the normal course enter the fourth grade at said Posen Elementary School.

e. Plaintiffs, MARK FIELD and WILLIAM ALEXANDER, are minors and bring this action by their parent and next

friend, MRS. LOUISE ALEXANDER. MARK FIELDS resides in Chicago Heights, Illinois, within the area under the jurisdiction of Cook County District No. 170. MARK FIELDS has for one and one-half years attended Franklin Elementary School within said district, has completed the first one and one-half years of elementary school, and commencing with the Fall 1968 school term will in normal course enter the third grade of said Franklin Elementary School. WILLIAM ALEXANDER resides in Chicago Heights, Illinois, within the area under the jurisdiction of Cook County District No. 170. WILLIAM ALEXANDER has for seven and one-half years attended Washington School within said district and has completed seven and one-half years of elementary school.

f. Plaintiff, VIRGINIA RUTH SCRUGGS, is a minor and brings this action by her mother and next friend, MRS. VIRGINIA SCRUGGS. VIRGINIA RUTH SCRUGGS resides in East Chicago Heights, Illinois, within the area under the jurisdiction of Cook County District No. 169. VIRGINIA RUTH SCRUGGS has for three and one-half years attended Cottage Grove School, has completed the first three and one-half years of elementary school, and commencing with the Fall 1968 school term will in normal course enter the fifth grade of said Cottage Grove School.

g. Plaintiff, the Concerned Parents and People of the West Side, is a not-for-profit corporation organized under the laws of the State of Illinois maintaining offices in the City of Chicago, County of Cook, Illinois, whose purpose is to improve the quality of educational facilities and services available to the citizens of Chicago and in particular to the citizens of an area within Chicago popularly known as "Lawndale." Membership in Plaintiff corporation is open to

all citizens of the City of Chicago, Illinois. The "Lawndale" area is under the jurisdiction of Cook County District No. 299 and within districts 8, 10 and 19 of said District.

5. This is a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class is all those students in the public schools of Cook County District No. 143½, 169, 170 and 299.

6. The class is so numerous that joinder of all members in this action is impracticable. There are questions of law or fact common to the class. Questions of law or fact common to the members of the class predominate over any questions affecting only individual members. The claims of Plaintiffs are typical of the claims of the class, and they and their attorneys will fairly and adequately protect the interests of the class. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for Defendants and a further risk of adjudications which would, as a practical matter, be dispositive of the interest of members of the class not parties to the adjudication. The class action is superior to other available methods for the fair and efficient adjudication of this controversy.

7. Defendants are Otto Kerner, Adlai E. Stevenson, III, Ray Page, and Michael J. Howlett. They are respectively Governor, Treasurer, Superintendent of Public Instruction, and Auditor, all of the State of Illinois. They are charged in their official capacities with the application and execution of the statutory scheme challenged in this suit. Defendants have enforced this statutory scheme generally and with regard to the class of plaintiffs, thereby making appropriate

declaratory and injunctive relief with respect to the class as a whole.

8. Under Art. VIII § 1 of the Illinois Constitution of 1870 and other applicable law, the State of Illinois is charged with and has assumed the responsibility of maintaining and supporting a thorough and efficient system of free public schools in which all children of the State may receive a good common school education.

9. The State of Illinois purports to fulfill its obligations to provide a thorough and efficient system of free public schools for all children by (i) establishing and maintaining school districts and delegating to each the limited power to levy and collect local school taxes and issue bonds and (ii) appropriating and disbursing directly to the several school districts sums of money from the Common School Fund of the State.

10. The statutory system under which the several school districts finance the education of their children is based upon (i) the assessed valuation of taxable property within the district (ii) the population of the school district (iii) limits set by state statute upon the tax rate applicable to the assessed valuation of taxable property (iv) limits set by State statute upon the power of school districts to issue bonds and (v) the results of various referenda for tax increases and bond issues. Ill. Rev. Stat. 1967, Ch. 122, 17-1 *et seq.*, § 19-1, *et seq.*, § 20-1, *et seq.*, § 32-5, *et seq.*, § 34-22 *et seq.*

11. The statutory system under which the State appropriates sums of money from the Common School Fund to the several school districts is based upon a formula that provides for a uniform grant per pupil in attendance plus an "equalization" grant designed to establish a minimum

total per pupil expenditure in each school district. Ill. Rev. Stat. 1967, Ch. 122 § 18-1 *et seq.*

12. For many years, numerous school districts of the State, including those in which Plaintiffs attend school, have levied real and personal property taxes for the support of schools at or near the highest rates permitted under the law of the State of Illinois and have consequently exercised to the fullest extent the power that has been delegated to them to raise monies for the maintenance of the schools of the district.

13. Nevertheless, the total per pupil expenditures in many school districts of the State of Illinois, including those in which Plaintiffs attend school, are far below the total per pupil expenditures in certain other school districts within the State of Illinois.

14. Because the taxing scheme is based upon local property values, which vary substantially between districts and over a period of time, disparities in local tax receipts for education would continue even if the maximum taxing powers of the respective districts were raised.

15. As a direct result of this substantial disparity in expenditures, there exist material disparities in the quality of educational programs, facilities and services provided to school children residing in various school districts within the State of Illinois.

16. As a direct result of the method of financing public education, there exist material disparities in the level of educational attainment achieved by students in different school districts within the State of Illinois. The class of plaintiffs attend school in school districts where in the record of educational achievement is markedly lower than in certain other school districts within the State of Illinois.

17. As a direct result of the method of financing public education, the class of Plaintiffs do not possess the normal reading, mathematical and other skills for their respective age and grade level.

18. By authorizing and continuing this method of financing public education, the State of Illinois has denied, and continues to deny, Plaintiffs:

a. the equal protection of the laws and due process of laws in contravention of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States of America in that classifications upon which students will receive the benefits of a certain level of per pupil educational expenditures are not related to the educational needs of these students and are therefore arbitrary, capricious and unreasonable;

b. the equal protection of the laws and due process of law in contravention of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States of America in that the method of financing public education fails to consider (i) geographical variations in school needs, school construction costs, teacher and professional salaries, and other similar costs (ii) the added costs necessary to educate those children from culturally and economically deprived areas (iii) the variety of educational needs of the several public school districts of the State of Illinois and (iv) the need to correct marked differences in the quality of public school facilities, equipment, programs, and services that have arisen from the past application of similar financing schemes;

c. the equal protection of the laws in contravention of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States of America

in that the method of financing public education fails to provide to each child an equal opportunity for an education; and

d. the equal protection of the laws in contravention of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States of America in that the class of Plaintiffs but not others are denied a good common school education.

19. The injury to the plaintiffs herein and to the members of their class as a result of the method of financing is irreparable, and the plaintiffs and the members of their class will continue to be irreparably injured unless the relief requested by this complaint is promptly granted. Any other relief to which these plaintiffs and members of their class might be remitted would be attended by such uncertainties and delay as to be a denial of substantial relief and would involve a multiplicity of suits.

WHEREFORE, plaintiffs respectfully pray that:

a. The Court convene a three-judge District Court as required at 28 U.S.C., §§ 2281 and 2284;

b. The Court declare the school financing scheme detailed in paragraph 1 of this complaint to be unconstitutional and void;

c. The Court preliminarily, and after full hearing, permanently enjoin further enforcement of and reliance upon those provisions detailed in paragraph 1 of this complaint;

d. The Court preliminarily enjoin and, after full hearing, order Defendants to submit to the Court a plan to raise and apportion all monies expended on the publicly-

supported schools of this State in such a manner that such funds available to the school districts wherein the class of plaintiffs attend school will be sufficient to assure that Plaintiff children will receive the same educational opportunity as the children in any other district and to assure that Plaintiff children will receive a good common school education;

e. That the Court grant such further relief as shall be necessary and proper.

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SUPREME COURT OF THE UNITED STATES

October Term, 1969

BURRUSS ET AL. *v.* WILKERSON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

No. 864. Decided February 24, 1970

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted and the case set for oral argument.